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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 175

INTERSTATE COMMERCE COMMISSION, et al.,
Appellants,

vs.

INLAND WATERWAYS CORPORATION, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF APPELLEES,

Inland Waterways Corporation, Cargill, Incorporated, Norris Grain Company, Rosenbaum Brothers, Santa Fe Elevator Corporation and Continental Grain Company.

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BRIEF ON BEHALF OF APPELLEES,

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Opinions Below.

The specially constituted District Court rendered no written opinion. Its findings of facts and conclusions of law in *Cargill, Inc., et al.* v. *U. S., et al.*, and *Inland Waterways Corporation* v. *U. S., et al.*, (R. 1662-1676) are reported in 44 Fed. Supp. 368.

The report of the Interstate Commerce Commission, Division 2, in *Investigation and Suspension Docket No. 4718, Grain Proportionals, Ex-barge to Official Territory,* appears in 246 ICC 353 (R. following page 18), and the report of the entire Commission on reconsideration (four Commissioners dissenting) appears in 248 ICC 307 (R. 47).

Jurisdiction.

The final decree of the District Court was entered on April 16, 1942. (R. 1677) Petition for appeal was filed (R. 1679) and allowed on May 21, 1942. (R. 1691) Probable jurisdiction was noted by this Court on October 12, 1942. The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (Title 28, U. S. C., Secs. 47 and 47a) and Section 238 of the Judicial Code as amended. (Title 28, U. S. C., Sec. 345)

DEFINITION OF TERMS.

In the interest of brevity, we define some of the terms used below: Grain arriving at Chicago via the Illinois waterways and reshipped therefrom via rail, either immediately or after a period of storage, is referred to as "ex-barge" grain. Grain arriving at Chicago on steamers over the Great Lakes and similarly reshipped therefrom is referred to as "ex-lake" grain. Grain arriving at Chicago via railroad and similarly reshipped therefrom is referred to as "ex-rail" grain.

Separately established rates, which by their terms apply only to grain which has received a prior transportation service of the particular character specified in the tariffs naming such rates, are referred to as "proportional" or

"reshipping" rates. Rates of this character as provided via rail from lower Lake Erie ports to the east on grain received at such ports via lake are referred to as "ex-lake" rates. Rates named on traffic originating locally at point of shipment, or which apply when the traffic shipped does not meet the conditions specified for the application of proportional, reshipping or ex-lake rates, are referred to as "local" rates.

The transportation document (usually a receipted freight bill) which discloses the fact and extent of a particular transportation service is referred to as "billing," and the inbound billing on ex-barge, ex-lake, and ex-rail grain is referred to as "ex-barge billing," "ex-lake billing", and "ex-rail billing." Such billing is treated as representative of the grain covered thereby and constitutes the evidence required to engage the application of the proportional, re-shipping or ex-lake rates on a reshipment made after an authorized period of temporary storage.

The privilege accorded a commodity of temporary storage at a point between first origin and final destination, and subsequent reshipment from such point on the basis of proportional or reshipping rates lower than local rates, is referred to as "transit."[1]

Questions Presented.

The order of the Interstate Commerce Commission enjoined below approved as just, reasonable, and not otherwise unlawful (R. 55) a proposed change in freight rates

[1] This transit is identical with the transit at the rate-break point described in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768. It is not like the creosoting-in-transit involved in *Central R. of N. J.* v. *U. S.*, 257 U. S. 247.

by eastern railroads which is designed to deprive ex-barge grain of the privilege of reshipment from Chicago[2] to eastern destinations on the basis of proportional and reshipping rates. That proposal also contemplates the continued application of such proportional and reshipping rates to ex-lake and ex-rail grain. In form, the assailed order of the Commission vacated a prior order which had suspended the effectiveness of the proposed change pending an investigation into the lawfulness thereof.[3] The only rates in issue before the Commission were the separately established outbound rates on grain from the reshipping points to eastern destinations.[4]

The District Court composed of Evans, Circuit Judge, and Woodward and Holly, District Judges, enjoined the order on the complaint of the appellees, who were among the protestants before the Commission.

The ultimate question presented is whether the Commission acted within the limits of its authority. The subordinate questions on which the case turns may be stated in definite form as follows:

1. Did the District Court have jurisdiction upon the complaint of the appellees to enjoin the order in the event it is shown that it was entered upon a misconstruction and misapplication of the statute? Subordinate questions on this point are: (a) Is an order vacating, after full hearing, an order instituting an investigation and suspension pro-

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2 While rates from other reshipping points were involved in the tariffs under investigation, we confine ourselves to Chicago since it is representative and is the reshipping point in which appellees are directly interested.

3 While the suspension was only for a period of seven months, the respondents voluntarily deferred the effective date of the proposed change until the Commission could decide the case.

4 The inbound rates *to Chicago* were not in issue and the western railroads, lake lines and barge lines, which publish and control the inbound rates, were not respondents in the order of suspension and investigation. Some of these carriers did become parties to the proceeding by entering an appearance at the hearing.

ceeding under Section 15(7) of the Act of the character which can be reached by the injunctive process?[5] (b) Did the Inland Waterways Corporation have an interest and standing which entitled it to bring and maintain its suit in the District Court?[6] (c) Were the railroads proper defendants in the District Court?[7] and (d) Do the grounds of invalidity on which appellees rely involve questions of law which it was proper for the Court to determine?

2. In finding under Section 1 that the particular rates here proposed would be just and reasonable, may the Commission take into consideration prior charges via barge paid inbound to Chicago and treat with the case as if it involved the aggregate of the inbound and outbound charges? Stated differently, may the Commission rest its conclusion that a separately established reshipping rate is just and reasonable for the future on the premise that the through rate resulting from combining that rate with a separately established inbound rate not in issue appears to the Commission to provide a just and reasonable through rate?

3. In a case in which the only rates in issue are the separately established proportional and reshipping rates, outbound from Chicago, does a difference in the types of carriers performing the inbound service, a difference in the lengths of their respective inbound hauls, and a difference in the charges assessed by such carriers for their respective inbound services constitute a dissimilarity of conditions within the meaning of Section 2 of the Act?

4. Did the Commission correctly construe the statute in

[5] This question is raised only by the briefs of the western railroads, who are not subject to the order, and is not raised by either the Commission or the eastern railroads.

[6] This question is not raised by the Commission which issued the order but is raised in the briefs of the eastern railroads.

[7] This question is raised only by the briefs of the eastern railroads. The Commission does not complain of the joinder.

holding that a difference in the outbound reshipping rates does not amount to a discrimination in rates in violation of Section 3 (4) of the Act between the connecting barge lines, on the one hand, and the connecting lake lines and western rail carriers, on the other, because of a difference in the nature and amount of the inbound services, and a difference in the charges assessed by the inbound carriers? A subordinate question under Section 3 (4) suggested in the briefs of appellants is: Must a through route be established by common arrangement before a common carrier by water can be considered a connecting line within the meaning of Section 3(4)?

5. (a) Were the rates in issue, as applied to ex-barge grain, proportional rates of the character defined and authorized by Section 6 (11) (b) of the Act, and if so, did the Commission act arbitrarily in refusing to determine in the case before it what would constitute reasonable proportional rates, as distinguished from local rates, on ex-barge traffic? (b) Did the Commission hold the railroad respondents to the burden of proof imposed by Section 15 (7) of the Act upon the proponent of a proposed increase in such rates?

6. Is there any evidence to support the preliminary finding that the proposed change would not prohibit the movement of grain via the barge-rail route to eastern destinations, and that the principal commercial effect of such change would only be to reduce the profits of the Chicago elevator operators?

7. Does the report of the Commission contain essential, preliminary findings sufficient to disclose a legal basis for the order and a proper application of statutory standards?

The foregoing questions, 2 to 7 inclusive, go directly to

the validity of the assailed order, and on the answer to them depends the propriety of the action of the Court below.

Statutes.

The pertinent provisions of the Interstate Commerce Act relied on herein are reproduced in Appendix "A" hereto.

Statement.

The record before the Commission embraces many matters which bore upon the issues before the Commission but do not bear upon the narrow questions of law presented here. Consequently, we restrict our statement to those facts which it is necessary to consider in disposing of the questions of law.

Most of such facts are stated in the reports of the Commission. However, it is necessary to go to the record before the Commission for the following purposes: (a) to explain some statements in the reports which are not clearly put; (b) to supply facts which the Commission did not mention, such as the barge rates from Kansas City, the lake rates from Duluth, and the movement of grain on such rates; (c) to show that the finding of the Commission regarding the effect of the proposed change on reshipments via rail of ex-barge grain is contrary to the evidence; and (d) to make clear the interest of the appellees and the effect of the Commission's order upon them.

THE RATE STRUCTURE.

The principal witness for the eastern lines stated that the proposal was made in the hope that the inbound movement of grain to Chicago would thereby be driven off the

barges and back onto the rails. (R. 266-7) Stated differently, the eastern carriers sought to destroy inbound barge service through the medium of establishing prohibitive rates on the reshipment from Chicago of any grain which arrived at that point over the Illinois waterways. The order of the Commission found that the change which the eastern lines proposed in their rates in order to accomplish that end would not result in any violations of the statute. The considerations upon which the Commission proceeded and upon which the validity of its order depends can be fully illustrated by considering only the following representative rates:

The inbound *interstate* rates via railroad which must be paid to Chicago to place grain in the elevators from whence it is subsequently reshipped are 9.5 cents[8] from Morris, Ill., and 16 cents from Kansas City, Mo. (Exhibit 67; R. ex. vol. p. 102) These are representative origins for the shipment of both ex-rail and ex-barge grain. The railroad rates from Duluth, Minn., to Chicago are 13 cents for proportional application, and 26 cents for local application. (Exhibit 72; R. ex. vol.[8a] p. 120)

The water rates to Chicago via barge are 2.75 cents from Morris, and 10.75 cents[9] from Kansas City. The water rate from Duluth to Chicago via lake steamer is 6.25 cents. (Exhibits 67, 72; R. ex. vol. pp. 102, 120)

The proportional and reshipping rate on domestic traffic from Chicago to New York, a representative destination, which presently applies on ex-barge, ex-lake, and ex-rail grain is 26 cents regardless of the territory

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[8] All rates are named herein in cents per hundred pounds.

[8a] "R. ex. vol." refers to the separate volume in which are reproduced the principal exhibits in the Commission proceedings.

[9] There are also other barge rates from Kansas City, Missouri, governed by different minimum weights per shipment. A rate as low as 8.8 cents is shown in Exhibit 63. That exhibit is not among those in the printed record.

in which the grain originated.[10] This rate is governed by Note 20 reproduced in Appendix III to the report of Division 2 (R. 18, p. 387),[11] hereinafter referred to as the Note 20 proportional. The corresponding local rate from Chicago to New York, which the Commission approved for ex-barge grain in the future, is 34.5 cents, an increase of 8.5 cents.[12] (R. 18, p. 365)

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[10] The brief of the Commission states "the key rate or basis of the grain structure was the Chicago-New York rate." (Br. 46) The western railroads use only the Chicago-New York rate to illustrate the eastern adjustment. (Br. 5) In its report on reconsideration the Commission uses New York as representative in stating that the through rate from Morris via rail is composed of the inbound interstate rail rate of 9.5 cents plus the outbound rate of 26 cents. (R. 53)

[11] The Commission print of the report of Division 2 appears in the printed record immediately following page 18. Record references in this style indicate the page of that report.

[12] From Chicago to destinations in Central territory, there are three different levels of proportional and reshipping rates on *ex-rail grain*, as shown in a table on page 365 of the report of Division 2 (R. 18, p. 365) These different levels for ex-rail grain are conditioned on the territory in which the grain originated, the Northwest basis applying on grain from Minneapolis and Duluth, Minn., and points in that direction; the trans-Mississippi basis applying on grain from Kansas City and points in that direction; and the Reshipping (the term being capitalized) basis applying on grain originating in Illinois. The *highest* of these is the Northwest basis. Prior to 1935, that basis applied on ex-lake grain from the head of the lakes. At that time there was some dispute as to which of these bases should apply on ex-barge grain from Illinois. To resolve that controversy, the eastern railroads on June 1, 1935, substituted a single agency tariff issue for the individual tariffs of the individual railroads. In rephrasing the tariff application notes in that agency tariff issue, the eastern railroads sought to secure uniformity as between outbound railroads and to treat all ex-water grain the same by making the Northwest basis (the highest) applicable on best-arrived grain without specification of origin territory. (R. 1423) A witness for the eastern lines testified that the language contained in the present Note 40 was selected in order to carry out that intent. (R. 1452-3) However, it should be noted that the trans-Mississippi rate (Note 20 in a tariff different from that naming the open proportional to New York) purports to apply on grain received at Chicago from Kansas City via either a rail or a water transportation line (Ex. 1, p. 4; R. (ex. vol.) p. 4) This is mentioned only in the interest of accurate statement, since none of the legal questions involved in this case turns on any incidental question as to how the present tariff should be construed and applied. Nor does the fact that ex-barge grain from Illinois presently takes a *higher* basis of proportional and reshipping rates than ex-rail grain from Illinois have anything to do with the proposal to deprive ex-barge grain of any proportional or reshipping basis whatsoever.

These rates are not Commission rates. Prior Commission cases involving an independent consideration of the proportional and reshipping rates in the territory east of Chicago are summarized in Section 2 of Appendix "C" hereto.

THE PROCEEDINGS BEFORE THE COMMISSION.

The case before the Commission arose when railroads, operating from Chicago to the east, filed with the Commission new tariffs to become effective October 15, 1939. By these tariffs, the eastern railroads proposed to restrict the proportionals above described so that they would not apply on ex-barge grain although they would continue to apply on ex-rail and ex-lake grain. (R. 18, p. 354) There was one exception to this restriction, *i. e.*, by the new tariffs the Note 20 proportional to New York and the trans-Mississippi proportional to Central territory would continue to apply on the reshipment of grain which had moved via barge from Kansas City, Mo., to Chicago under rates published in a particular tariff which the Inland Waterways Corporation had on file with the Commission.[13]

Other than on the excepted shipments, the effect of the proposal would be to subject ex-barge grain to the full local-rate basis and to New York would increase the rate

[13] Item 3632 of Federal Barge Lines' Freight Tariff, No. 31-J, I. C. C. No. 148, supplements thereto, or successive issues thereof. (Ex. 1, p. 7 for the trans-Mississippi application; p. 22 for the Note 20 application; R. ex. vol. pp. 7, 22) This exception will be described in detail in connection with the description of the Inland Waterways Corporation.

by 8.5 cents. The appellees, with others, protested this proposed change as constituting a violation of Sections 1, 2 and 3 of the Interstate Commerce Act.[13a] Thereupon the Commission suspended the proposed change until May 15, 1940, and entered into an investigation concerning the lawfulness thereof. The proceedings were not concluded by May 15, 1940, and the railroads voluntarily postponed the effective date of the proposed change until the Commission could conclude its investigation and enter an appropriate order. (R. 18, p. 354)

A full hearing was had in the matter in December of 1939 and January of 1940. The eastern railroads were the only respondents before the Commission although western railroads became parties by entering appearances. The respondents presented only one witness, W. T. Tannehill, whose direct evidence occupies only six pages of the printed record. (R. 214-20) He stated that the reasons for the proposal were as follows (R. 214):

> "The loss of tonnage to the rail carriers; the serious disturbance the present situation is having upon the grain rate structure in the territory generally; the discrimination and undue prejudice and preference as against rail shippers of grain in the origin territory in Illinois."

Each of these reasons related only to the competition between western railroads (or western segments of eastern railroads) on the one hand, and barge service via the Illinois River, on the other, for the inbound tonnage of the grain into Chicago.

There is no claim that the eastern lines, who are responsible for and in control of the rates in issue, have lost

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[13a] Section 1 prohibits "every" unjust and unreasonable rate for any service or "any part thereof." Section 2 prohibits charging one shipper more than another shipper for a like service in the transportation of like property under substantially similar circumstances and conditions. Section 3(4) prohibits discrimination in rates as between connecting carriers.

any tonnage because the proportional and reshipping rates, rather than the local rates, have been applied to ex-barge grain. The proposal was made because of tonnages to Chicago which western railroads had lost to barge service. Western lines complained that they had been unable to meet the barge competition for the inbound hauls, even by the publication of certain reduced intrastate rates (sometimes called lake locals), which were restricted so as not to apply on grain reshipped via rail under transit. (R. 18, p. 364)

The witness for the eastern lines said (R. 266-7):

> "We made this proposal, as I have stated several times, and filed these tariffs with the hope that we could drive this business off of the water and back onto the rails where it belongs and quit whittling down our rates farther and farther away from the influence of this water all the time because of cross-country competition *in the origin territory* and to put this grain back on the rails where it belongs."

The alleged disturbance in the railroad rate structure related entirely to the establishment of the reduced intrastate rates only on corn to Chicago published "to meet water and truck-water competition" (R. 216), and the District Court so found. (Finding No. 23; R. 1674) That adjustment had spread over east of the Indiana-Illinois state line, but only because the New York Central operates from Streator through Dwight, Reddick, Kankakee, Momence, and Delmar, Ill., and thence across the state line through Schneider, Ind., *into Chicago.*[14] (R. 258)

[14] In referring to these intrastate rates, counsel for the Commission repeatedly asserts that the proportional and reshipping rates are not applicable on ex-rail grain received thereon. This is not an accurate statement. The proportional and reshipping rates of the eastern lines are not restricted against that traffic. The restriction of the inbound rates to Illinois intrastate traffic only is published and maintained by the originating carriers, the western lines. (R. 259; 1261) Even after grain moves inbound on these intrastate rates, it can still move outbound on the proportional and reshipping rates provided the inbound charges are set up to the basis of the inbound *interstate* rates. (R. 259) Exhibit 12 (R. (ex. vol.), p. 56) contains a statement of cars so handled. (R. 220)

There is not a word of evidence that the existing adjustment, which has been in effect and used since 1933, has either induced any actual change, or has threatened a prospective change, in the rates from any Indiana or Ohio origin to an eastern destination. No shipper to New York on any rate from an origin east of Chicago appeared to complain of the existing adjustment or to suggest, if continued, that his rates should be changed.

The only shipper *from a country station* away from the influence of the river who testified regarding the effect of the barge movement on shipments to eastern destinations or to markets other than Chicago, was Witness Burwash, a farmer and country elevator operator at Savoy, Ill., 132 miles directly south of Chicago, who has available only transportation on the normal all-rail basis. He testified that the lower rates enjoyed by farmers in the Illinois River Valley did not disadvantage him in any way, and that if the advantage now enjoyed by the ex-barge grain from Morris was taken away, it would do him no good.[15] (R. 1077)

At the time the case was heard, the inbound rates via barge on bulk grain were not subject to the Interstate Commerce Act and were not filed with the Commission. This lack of Commission regulation of the inbound water rates was given as an additional reason by eastern railroads for the proposal under investigation. (R. 256; statement of railroad counsel, R. 325) This fact was also offered in explanation of why the eastern railroads proposed that the proportional and reshipping rates continue to apply on ex-barge grain transported to Chicago under a particular item in an Inland Waterways Corporation tariff, which was on file with the Commission, as heretofore noted. (R. 256)

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[15] The through railroad rate on grain from Savoy, Ill., to New York City is indicated as 38 cents. (R. 384-5)

THE REPORTS OF THE COMMISSION.

After hearings, the Commission, Division 2, issued its report and order of July 31, 1941, 246 I. C. C. 353. (R. 18) Pages 353 to 367 of that report are devoted to a description of the proceeding, to stating some of the facts shown by the evidence before the Commission, and to a recital of the contentions advanced by the various parties to the case.

The remainder of the report, pages 367 to 399, is devoted almost exclusively to a question of tariff interpretation, *i. e.*, whether the tariffs then and presently in effect could be construed under Section 6 of the Act so as to make legal provision for the application of the proportional and reshipping rates to ex-barge traffic.[15a] After a very detailed discussion, Division 2 concluded that the tariffs did not provide for such an application, the ultimate finding of Division 2 reading as follows (R. 18, p. 381):

> "We conclude that the proportional rates here in issue have never been applicable on this barge traffic moving on unfiled rates,[16] and find that the schedules under suspension are not shown to be unlawful. An order will be entered vacating the order of suspension, and discontinuing this proceeding."

The finding just quoted did not purport to find reasonable a *change* in existing rates, although the investiga-

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[15a] As incidental to that discussion, the report of Division 2 enunciates some conclusions of fact regarding an alleged rate disturbance caused by the movement of ex-barge grain which were not renewed in the report of the Commission on reconsideration and consequently should be considered as withdrawn. This matter is dealt with under Point VIII, D hereof, pages 93 to 95, below.

[16] At the time the case was heard, the Interstate Commerce Act did not require barge lines to file all-water rates with the Commission. By the time the case was decided by Division 2, the Interstate Commerce Act had been amended by the Transportation Act of 1940 (54 Stat. L. 899) so as to subject common carriers by water, other than certain exempt classes, to regulation and so as to impose upon them the obligation of filing rates with the Commission. Such inbound rates on grain via barge were filed under the provisions of the statute on March 1, 1941 prior to the date of the finding quoted in the text above.

tion was instituted and heard under Section 15(7) of the Act on the assumption that a change was proposed. Rather, the sole premise for the finding entered in the report of July 31, 1941, was that the revision in tariffs under investigation made *no* change in the rates legally applicable to ex-barge traffic. If Division 2 had been right about that, there would have been no issue before the Commission under Sections 1, 2, and 3 of the Act.

Commissioner Alldredge dissented from the report of the majority of Division 2 as to its finding that no change was involved, and in his dissenting opinion expressed the view that the proposed change would result in unlawful rates. (R. 18, pp. 381-383)

Thereafter, petitions for reconsideration and reargument were presented to the Commission by appellees and others. (R. 48)

Reargument was denied, but on December 1, 1941, the Commission issued a report on reconsideration to which four commissioners out of the eleven, *i. e.*, Chairman Eastman and Commissioners Alldredge, Porter, and Johnson, dissented. (R. 47, *et seq.*)

The report of the majority on reconsideration described the prior report of Division 2 and, as the first matter to be treated, reversed the finding of Division 2 as to the non-application of the proportional and reshipping rates to ex-barge traffic under present tariffs, which was the whole predicate for the earlier report. (R. 51)

The report on reconsideration then recites the inbound rates on ex-barge grain as compared with the inbound rates on ex-rail grain, that recital being confined, however, to rates from Illinois origins in disregard of the fact that ex-barge grain from other shipping points such as St. Louis, Mo., Kansas City, Mo., etc., are equally involved.

The report then takes up a comparison of the barge-rail combinations with the all-rail combinations, and with the local rates from Chicago. Speaking of trunk-line territory, the report states (R. 52-3):

> "The barge-rail combinations are far below the local rates from the reshipping points in contravention of the fourth-section rule, while the all-rail rates are in strict conformity with that rule."

The report contains a number of findings making comparisons of the aggregate of the inbound and outbound rates. (R. 53)

The comparison indulged in by the Commission of the total charges on the inbound and outbound moves prevented consideration on their own merits of the separately stated reshipping and proportional rates which were the subject of the investigation. The theory on which the Commission predicated this approach to the case is stated later in the report in the following language (R. 54):

> "As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are of course determined by the measure of the inbound and through rates and properly may vary according to the relative length and nature of the inbound and through service."

The inbound charges, used to make up the totals embraced in the comparisons on which the Commission purported to predicate its ultimate conclusion, were not in issue before the Commission, and at the time of the hearing such inbound charges via water were not subject to the Commission's regulation.

The phase of the case which was the subject of more testimony than any other phase was the effect of the proposed changes upon the traffic and upon the protestants.

The Commission's findings on that phase of the case are embodied in a single sentence reading (R. 53-54):

> "The proposed schedules will not prohibit the movement by barge-rail even to trunk-line territory, their principal commercial effect being to reduce the profits of the Chicago elevator operators."

The Commission noted in general terms the allegations of the protestants that the proposed change would result in the discriminations, both as between shippers and as between connecting carriers. It found that the physical carriage beyond the reshipping point is the same for ex-barge as for ex-rail and ex-lake grain. (R. 54) It concluded that a difference in proportional and reshipping rates for similar physical services would not be discriminatory because, the majority said (R. 54):

> "* * * reshipping or proportional rates are in their essence balances of through rates. Such balances are of course determined by the measure of the inbound and through rates and may properly vary according to the relative length and nature of the inbound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding. * * *."

Having disposed of the protestants' contentions on the grounds stated, the report of the majority goes on to observe (R. 54-5):

> "* * * in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-and-rail rates lower than the combinations."

The ultimate conclusion in the report of the majority was expressed as follows (R. 55):

> "The facts of record as detailed by the division and summarized herein, clearly show that respondents are justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic and that the

proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act.

"On reconsideration of the record in the light of the petitions and replies thereto and our prior decisions, we find that:

"(1) The proportional rates here under consideration were legally applicable on the ex-barge traffic where the so-called policing provisions were strictly complied with.

"(2) The proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful.

"The prior findings, 246 I. C. C. 353, are modified and clarified accordingly. The above enumerated petitions are denied in all other respects.

"An appropriate order vacating the order of suspension and discontinuing the proceeding will be entered."

INTEREST OF THE APPELLEES. THE CHICAGO ELEVATOR COMPANIES.

Cargill, Incorporated, Norris Grain Company, Rosenbaum Brothers, Santa Fe Elevator Corporation, and Continental Grain Company, appellees, are grain merchants operating public elevators at Chicago with a combined capacity of 25 million bushels.[17] (R. 1493-4) They were referred to as the Chicago elevator operators in the proceedings before the Commission and will be so referred to herein. The primary business of these appellees is to buy grain offered for sale on the spot market in Chicago, to store that grain awaiting sale, and subsequently to sell and to ship that grain for consumption in eastern territory to the extent permitted by the outbound rates. (R. 1500, 1502)

Little or no grain moves into and out of Chicago in a

[17] The total grain elevator capacity at Chicago, both public and private, is 50 million bushels. (R. 1494)

continuous through movement. Rather, the inbound service to Chicago comes to an end by delivery into an elevator, the title to the grain passing at that time to an elevator operator, and the outbound reshipment comes later as an independent transaction. (R. 1368, 1554) This is so to an identical degree in the case of ex-barge, ex-rail, and ex-lake grain. A table shown in Appendix I to the report of Division 2 of July 31, 1941 (R. 18; p. 383) shows that in the calendar years 1933 to 1939, inclusive, the total receipts at Chicago of corn, wheat, oats, and soybeans, divided 39,725,000 bushels via lake, 38,096,000 bushels via barge, and 812,743,000 bushels via rail.

The Chicago market thus provides a better *net* bid to the country shipper within reach of the barge service than it otherwise could, and the country shipper naturally accepts the best bid offered. (R. 1541-2) This has increased the volume of business merchandised through Chicago to the benefit of the appellees. (R. 1514-5, 1560, 1626) The success and profits of the appellees is directly predicated upon the volume of the grain they merchandise. (R. 1527, 1628)

In order to provide facilities for the accumulation of grain along the river and for transfer to barges, some of the appellees (Continental Grain Company and Norris Grain Company), as well as other interests, have invested large sums in elevators on the river banks. (R. 18, pp. 355; 1535-9) Some of these elevators have no facilities to ship via rail and were built on the river bank solely to serve the river movement. (R. 1536)

When grain is accumulated by an appellee in a river bank elevator, it pays for that grain the going delivered price at Chicago, less the cost of accumulation and transportation to Chicago via barge, and less a margin to cover the cost of operating the river bank elevator and a return on the investment therein. (R. 1540) The grain so accumu-

lated by a Chicago house in a river bank elevator is subsequently transported by it to Chicago via barge. The reshipment of such grain to the east from Chicago is definitely related to the outbound rate structure. (R. 1618) If a rate penalty of 8.5 cents is imposed on ex-barge grain, it will be a blockade. (R. 1515)

When appellees have accumulated or received ex-barge grain in their terminal elevators at Chicago, that grain must be sold in competition with ex-lake and ex-rail grain in the hands of other merchandisers. If ex-barge grain is deprived of the proportional and reshipping basis so that a rail reshipment could be made only on the basis of the local rates it cannot be sold against that competition to any destination which must be reached by rail service. (R. 1575-7)

Incidentally, the eastern lines, who were respondents before the Commission, now provide and propose to continue in the future ex-lake rates from Buffalo, New York, to the east, which are lower than local rates, and which are neither conditioned on the grain having had prior rail transportation, nor on the water rates up to Buffalo being filed with the Interstate Commerce Commission. (R. 1280; Exhibit 70 (R. (ex. vol.) p. 118)

The lack of a corresponding basis of reshipping rates on ex-river grain from Chicago would prevent the appellees from selling ex-barge grain for rail shipment in competition with Buffalo merchants. (R. 1590-1)

INTEREST OF APPELLEE, INLAND WATERWAYS CORPORATION.

Inland Waterways Corporation, operating the Federal Barge Line, sometimes referred to as Federal, performs a common carrier service by barge on various rivers, including the Mississippi between the Twin Cities

and New Orleans, the Missouri as far as Kansas City, and the Illinois and Chicago rivers to Chicago (R. 1209). It handles miscellaneous commodities as well as grain in tows of several barges each (R. 1219-20; 17). The transportation of bulk grain by Federal does not come within the exemption from regulation provided by Section 303(b) of Part III of the Interstate Commerce Act because of the inclusion of miscellaneous commodities with bulk grain in the same tow.

Federal transports *bulk grain* on port-to-port rates which are constructed on the basis of two mills per ton-mile (R. 1211). These rates are subject to various minima ranging from 140 to 1500 tons per shipment (R. 1211). These rates do not cover the service of loading the grain into or unloading the grain from the barges (R. 1211). If the loading or unloading is performed by Federal, additional charges are provided and assessed. (R. 1235)

Federal maintains terminals at points such as Kansas City, St. Louis, Peoria, and Chicago which are served by the railroads (R. 1221-2).

When Federal performs the service of transferring grain between barges and cars at its terminals, it utilizes a steam shovel. (R. 1221) However, all grain heretofore delivered at Chicago has been handled through grain elevators. (R. 1216, 1222-3)

Neither report of the Commission makes any mention of the grain which Federal has transported to Chicago.

Exhibit 63 (R. (ex. vol.) 101) shows the tonnages of bulk grain transported by Federal to Chicago from 1933 to 1939, inclusive, as follows: 4,657 tons in 1933; 45,772 tons in 1934; 32,367 tons in 1935; 35,220 tons in 1936; 52,900 tons in 1937; 5,843 tons in 1938; and 43,292 tons

in 1939. Collectively, these tonnages originated at Burlington, Iowa, East St. Louis, Havana, Kampville, Keithsburg, Lacon, Montezuma, Morris, Oquawka, Pekin, Peoria, and Peru, Illinois, Leavenworth, Kansas, and St. Louis and Kansas City, Mo. Shipments of *wheat* from Kansas City accounted for 40,312 tons in 1939.[18]

In recent years, Federal has handled little grain from origins on the Illinois waterways due to the fact that its rates are higher than the rates of other barge lines operating from origins on that waterway into Chicago. (R. 1240-1)

At the time the case was heard by the Commission, in December, 1939. and January, 1940, Federal's rates on bulk grain were not filed with the Commission, and the Commission had no jurisdiction over port-to-port transportation by water carriers in the absence of a common arrangement for through carriage. (R. 1212, 1224)

After the hearings, but before the decision by Division 2, the Transportation Act of 1940 was enacted (Sept. 18, 1940). That act added Part III to the Interstate Commerce Act and subjected port-to-port transportation by water carriers to regulation. It also brought common carriers by water within the protection of Section 3(4) of Part I which prohibits discriminations by railroads between connecting lines. In the report of the Commission on reconsideration, official notice was taken of the fact that Federal has filed its port-to-port rates as required by Part III. (R. 49)

The general freight agent of Federal expressed the opinion that Federal would go out of the bulk grain traffic if the suspended tariff were approved. (R. 1237)

The affidavit of the general traffic manager of Federal filed in the lower court shows that it competes with paral-

[18] At a weight per bushel for wheat of 60 pounds (R. 1254-5) 40,312 tons is the equivalent of 1,342,390 bushels.

leling railroads for the transportation of bulk grain from Kansas City and other origins to Chicago; that it transported 30,958 tons of such grain to Chicago in 1940 and 37,093 tons in 1941 in tows which also contain freight other than bulk commodities; and that grain heretofore transported by Federal to Chicago has been reshipped to eastern destination on proportional and reshipping rates. That affidavit further shows, if the proposed change becomes effective, that it will be impracticable to ship ex-barge grain from Chicago to eastern destinations via railroad; that no shipper will use the service of Federal in the transportation of bulk grain to Chicago if either such shipper or his vendee desires to ship such grain via railroad to a destination east of Chicago; that under these circumstances there will be less incentive for shippers to use the service of the Federal to Chicago and a corresponding greater incentive to use the service of the railroads with which Federal competes; and that Federal will not secure for transportation to Chicago as much grain as it would secure if the same rates are applied upon a reshipment of ex-barge grain as are applied on a reshipment of ex-rail or ex-lake grain. (R. 1707-12)

In the tariff provisions which the Commission approved as lawful, there is one exception to the application of the proportional and reshipping rates to ex-barge grain. That exception provides that the trans-Mississippi rate will apply from Chicago to Central territory destinations and the Note 20 proportional and reshipping rate to trunk-line and New England destinations on the reshipment of grain which has moved via barge from Kansas City, Mo., to Chicago, Ill., under rates which Federal had published and filed with the Commission prior to the start of the case.[19]

[19] Item 3632 of Federal Barge Lines Freight Tariff, No. 31-J, I.C.C. No. 148 and reissues thereof. (Ex. 1, p. 7 for the trans-Mississippi application; p. 22 for the Note 20 application; R. (ex. vol.) pp. 7, 22)

The rates published in the item referred to are confined to package grain or grain products subject to the same minimum weight as is provided in connection with a railroad carload movement. (R. 1214) Alfalfa meal, a grain product, has moved on these rates. (R. 1230)

EVIDENCE AS TO THE EFFECT OF THE PROPOSED CHANGE ON THE MOVEMENT OF EX-BARGE GRAIN.

As to the Chicago elevator making a cash sale of ex-river grain into the eastern marketing area which requires rail service to reach it, the Commission found (R. 53):

> "The proposed schedules will not prohibit the movement by barge-rail even to trunk-line territory, their principal commercial effect being to reduce the profits of the Chicago elevator operators."

The District Court found as a fact that there is no evidence in the record to support the foregoing finding. (R. 1670-1, Finding No. 18) Additionally, the District Court found as a fact upon the undisputed evidence that ex-barge grain would be exclusively confined to reshipment from Chicago via lake if the proposed change were made effective and recited in some detail the facts disclosed by the evidence which led it to that conclusion. (R. 1671)

The appellants do not assert that any of the facts set forth in Finding No. 18 of the District Court is contrary to the evidence. Consequently, it would seem to be unnecessary to provide references to the record in support of the fact as found by the District Court. However, in the interest of completeness, the evidence on this point is summarized with complete record references in Appendix "B" hereto. (*Post* p. 117)

The eastern railroad appellants assert (Br. 79) that the finding of the Commission is supported by the testi-

mony of a witness who stated (R. 267-9) that the matter of supply and demand would determine whether ex-barge grain would be reshipped on the basis of the local rates. An examination of the record indicates a complete lack of any definite statement as to the likelihood of a movement of ex-barge grain on local rates. The witness in question qualified as to railroad experience (R. 214) but did not qualify as knowing anything about the grain business. All of his answers on this point were evasive in the sense that they were "maybe yes" and "maybe no". For example he said (R. 267-8):

> "If the question of supply and demand is there it [ex-barge grain] might move water—or might move rail but it is only natural to assume if it is export grain or grain that is going far into trunk-line territory without transit within the nearby CFA territory where it may be milled, it will go by water, but don't overlook this, Mr. Belnap, that the large part of the grain that we handle out of Chicago is for transit intermediate to the seaboard, which they cannot get via lake."

The subsequent statements of the witnesses were directed to the entire movement of grain east of Chicago and to the movement of ex-barge grain in rare instances only. The following questions and answers are illustrative (R. 269):

> "Q. That is, do you think you have just as much likelihood of getting for rail movement this ex-barge grain if you increase the rates east of Chicago by 8½ cents?
>
> • • • •
>
> "A. On barge traffic inbound we might lose. Maybe there won't be as much barge traffic.
>
> "Q. Whatever it is it won't go by rail?
>
> "A. Some of it might.
>
> "Q. Do you think it will increase it?
>
> "A. No, it won't increase it. I don't think it will increase the movement of barge traffic.

"Q. Do you think it will reduce it?
"A. It might.
"Q. Have you any doubt about it?
"A. It might reduce the barge traffic, but to the same point it would probably increase our movement of traffic that came in by rail and out by rail, in all probability.

• • • • •

"A. What we may lose to the barge we will at least pick up from the rail movement east of Chicago.
"Q. You hope to get the additional movement into Chicago by rail?
"A. Yes."

The same witness expressed the hope of the eastern lines that "the effect will be of additional all-rail grain from this Illinois territory" (R. 265), and when asked if the proposal was made in a belief that it would induce the reshipment of ex-barge grain via rail (R. 267), answered, "No."

Summary of Argument.

The whole attack on the order of the Commission involves pure questions of law, *i. e.*, whether the matters considered by the Commission were those which it was legally authorized to consider in applying the statutory standards; and whether there is any evidence to support certain preliminary findings on which the Commission predicated its ultimate conclusion. This Court is not asked to determine independently what would constitute lawful rates under the facts and the statute. This Court is asked to construe the governing statutes. It is readily agreed that the injunction should not have issued if this Court finds as a matter of law (a) that the Commission was authorized to predicate its ultimate conclusion on the matters considered by it to be controlling in the premises;

(b) that the preliminary findings of the Commission are supported by the evidence; and (c) that the matters considered by the Commission as controlling are reasonably related to the discharge of its administrative function.

The case before the Commission involved a proposed change in rates by eastern railroads which would discriminate against connecting barge lines in favor of connecting lake lines and railroads and which would destroy the equality of reshipping rates heretofore enjoyed by shippers of ex-barge, ex-lake, and ex-rail grain. Only outbound rates of eastern railroads were under investigation. The transportation services performed under such rates are, in fact, separate transactions wholly independent of the inbound hauls. Producers, sellers, and shippers of grain from country stations to reshipping points are alone concerned with the level of the inbound rates.

In finding that the proposed change is just, reasonable, and not shown to be otherwise unlawful, the Commission did not proceed within the limits of its statutory authority in the following respects and for the following reasons:

(1) The Commission concluded that a proposed advance of 8.5 cents in the rate to be applied on a reshipment of ex-barge grain from Chicago to New York would be reasonable on the ground that the through rate resulting from combining the increased outbound rate via railroad with the existing inbound rate via barge appeared to be reasonable. That action of the Commission is tantamount to making the reasonableness of the outbound rate, which the Pennsylvania Railroad is entitled to charge for its own services from Chicago to New York, depend on what some other carrier sees fit to charge for bringing the traffic to the point where the services of the Pennsylvania Railroad begin. That does not constitute a correct application of the statu-

tory standard. Plainly, the Commission would not be authorized to force the continuance of a non-remunerative reshipping rate on the ground that the through charge composed of an excessive inbound rate and such non-remunerative reshipping rate is just and reasonable. The converse is equally true. Whether a separately established reshipping rate is non-remunerative, or is reasonable, or is in excess of a maximum reasonable rate must be determined independently of the inbound rates in which neither the shipper nor the carrier from the reshipping point has any interest.

(2) Section 2 of the Act prohibits as unjustly discriminatory the charging of a different rate to one shipper than to another when such rates are applied to like and contemporaneous services in the transportation of a like kind of property under substantially similar circumstances and conditions. The Commission finds that this section is not violated by the proposal on the ground that differences in the matter of inbound rates, relative lengths of the inbound hauls, and in the nature of the inbound services (whether via river, lake, or rail) justify a difference in the outbound reshipping rates. This is directly contrary to the meaning heretofore accorded Section 2 by the Commission, by this Court, and by the English courts construing a similar provision in the English statutes on which Section 2 is directly modeled. The matters which the Commission is legally entitled to consider in applying Section 2 are limited to those which relate directly to the particular service for which the rates in issue apply, and do not embrace circumstances which arise either before the service of the carrier begins or after it is terminated.

(3) The Commission declined to find that the proposal would violate Section 3(4) which prohibits discrimination

in rates by railroads as between connecting carriers, such connecting carriers, including, by definition, common carriers by water subject to Part III of the Act. To the extent that the Commission treated as non-discriminatory a difference in rates as between traffic brought in by barge lines, on the one hand, and traffic brought in by lake lines and by railroads, on the other hand, because of differences incident to the inbound services, carriers, and rates, the Commission misconstrued and misapplied the statute, akin to the error committed in applying Section 2.

Even if the proposed rates are otherwise reasonable, they are nevertheless unlawful if discriminatory.

To treat the difference between inbound service via barge, on the one hand, and inbound service via lake, steamer, or by railroad, on the other, as controlling upon the relation of the outbound rates, not only exceeds the bounds of administrative discretion, but is in contravention of the National Transportation Policy as declared by Congress in the Transportation Act of 1940.

A barge line is entitled to the protection against the discrimination in rates provided by Section 3(4), even though it and the railroad guilty of the discrimination have not established through routes by common arrangement. To hold differently circumscribes the application of Section 3(4) in a manner not intended by Congress, and treats the 1940 amendment of that section as mere surplusage. This is so, because all common carriers by water which participated with rail carriers in through routes by common arrangement were protected by Section 3(4) as it read prior to the 1940 amendment, which added "common carriers by water subject to part III" to the connecting lines protected against discrimination in rates. That amendment would add nothing to the section unless read as including

water carriers who do not participate in through routes by common arrangement.

(4) The existing proportional and reshipping rates on ex-barge traffic are proportional rates of the character defined and authorized in Section 6(11) of the Act. The Commission states that reasonable proportional rates lower than local rates might be prescribed on ex-barge traffic in a proper proceeding but could not be determined on the present record. Under Section 15(7), the burden of proof as to what would constitute reasonable rates on the reshipment of ex-barge grain was upon the eastern railroads, the respondents before the Commission. If the record in the instant case is inadequate, that burden of proof was not borne. In that situation the Commission exceeded its authority when it found that the proposed rates are shown to be just and reasonable.

(5) Under Section 15a of the Act, Congress directed the Commission, in the exercise of its power to prescribe just and reasonable rates, to consider, among other factors, the effect of rates on the movement of the traffic by the carriers for which the rates are prescribed. The Commission finds that the proposed rates would not be so high as to make impossible the reshipment of ex-barge grain from Chicago via railroad and that the only effect would be to reduce the profits of the Chicago elevator companies. This finding is not supported by any evidence and is directly contrary to all the evidence on the point.

(6) The order is not supported by essential basic findings sufficient to disclose a reasonable basis for the order and the proper application of any statutory standard. The findings which are contained in the reports are insufficient, even if otherwise valid, for the following reasons:

(a) The detail of the rate structure touches no issue in

the case since the approved proposal is not predicated on the detail of that structure, but is offered only as a means of preventing the reshipment of ex-barge grain from Chicago via rail in the hope of making the inbound barge services less usable.

(b) The finding as to the reasonableness of the local rates, as such, is irrelevant since the case involved the reasonableness of rates applied on a reshipment of grain rather than the reasonableness of local rates, as such. Furthermore, no finding as to reasonableness can cure the discriminatory character of the proposed rates.

(c) The findings of the report of Division 2 relating to an alleged disruption of the rate structure were not restated in the report of the Commission on reconsideration and must be considered as withdrawn.

(d) The alleged disrupting effect of the barge movement means only that the low inbound rates via barge to Chicago have induced competitive reductions in the inbound rail rates maintained by western carriers. That effect cannot serve to justify the proposed rate penalty east of Chicago.

(e) The fact that low inbound barge rates from some origins added to existing proportional rates from Chicago produce an aggregate less than the local rates from Chicago (referred to by the Commission as in contravention of the Fourth Section rule) does not support an order approving as reasonable the local rates on all ex-barge grain. In the first place, the full local basis on ex-barge grain is not required by a combination rate which will clear the Chicago local rates. Second, the rates of the appellee, Inland Waterways Corporation, from Kansas City plus the outbound proportionals via railroad invariably exceed the local rates from Chicago, so that this finding means nothing as applied to reshipping rates on ex-barge

grain from Kansas City in which this appellee is particularly interested. Third, if the present outbound proportionals lower than local rates are proper, aside from their application to ex-barge traffic, the advent of the low-rated barge service from Illinois origins could not make improper what was theretofore a proper railroad rate. Fourth, the ex-lake grain for which the Commission approves the existing proportional and reshipping rates likewise moves on a combination of lake and rail rates, less than the local rates from Chicago. Fifth, in amending the Fourth Section in 1940, Congress specifically provided that no railroad rate need be changed by reason of extending that section to cover a combination through rate composed of a port-to-port water rate plus the rate of a rail carrier. Sixth, the Fourth Section, no matter how construed and applied, cannot serve as a cloak for prohibited discriminations.

(f) The general finding that outbound proportional and reshipping rates may differ because of differences incident to the inbound services, carriers, and rates is insufficient, even if these differences are entitled to consideration, in the absence of findings which predicate a particular difference in outbound reshipping rates on particular circumstances incident to the inbound hauls.

As to the jurisdiction of the District Court by reason of the character of the order, the parties complaining, and the parties reached by the decree:

The assailed order is of a character which can be reached by the injunctive process because it is the equivalent of an order dismissing a complaint upon a misapplication and misconstruction of the governing statute. When the Commission acts under Section 15(7) after full hearing, it must issue such mandatory orders as are required when

the statutory standards of lawfulness are applied to the facts shown by the evidence and entitled to its consideration.

Inland Waterways Corporation has an interest and standing which entitled it to bring and maintain its suit in the District Court because Section 3(4) confers a right upon it to have the Commission forbid conduct by the eastern railroads of which this appellee complains.

The eastern railroads were proper defendants in the District Court because the only relief sought against them was an injunction forbidding action under the authority of an illegal order. The decree entered by the District Court did not otherwise interfere with their right to initiate rates.

ARGUMENT.

I. The District Court had jurisdiction upon complaint of the appellees to enjoin the order because predicated on errors of law.

A. THE ASSAILED ORDER IS OF THE CHARACTER WHICH CAN BE REACHED BY THE INJUNCTIVE PROCESS.

The Commission entered its order pursuant to the power conferred upon it by the Section 15(1) of the Act to determine and fix reasonable, non-discriminatory, and non-prejudicial rates for common carriers by railroad. The power so conferred can be exercised in three types of proceedings, *i. e.*, (1) upon a formal complaint brought under Section 13(1) of the Act, assailing as unlawful some existing rate; (2) upon an investigation instituted by the Commission on its own motion as to an existing rate, this under Section 13(2) of the Act; or (3) upon suspension of a proposed change in an existing rate and a subsequent investigation (full hearing) under Section 15(7) of the Act.

The order in this case was entered by the Commission in a proceeding of the third class. The power of the Commission to enter an order directed to rates is precisely the same in all three types of proceedings, and the standards by which the lawfulness of rates must be determined are the same in one as in the others.

The appellees in this case are in precisely the same situation as if the proposed change had become effective, the appellees had then complained thereof by formal complaint, and the Commission had dismissed that complaint.

If it be assumed, as the appellees contend, that the Commission rested its ultimate conclusion on an error of law, then it is clear that the appellees are without relief unless it can be secured in this case. Obviously, it would be futile to prosecute a formal complaint before the Commission, since it must be assumed that in any new proceeding the Commission would construe the statute precisely the same as it has done in this proceeding and would arrive at the same ultimate conclusions. The character of the proceeding can have no influence on the administrative judgment as to what constitutes a lawful rate.

In *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, and for many years thereafter, this Court consistently held that the courts were without power to review an order entered by the Commission in any case where the order was negative in form and in substance. However, the *Procter & Gamble Co.* case was overruled in *Rochester Telephone Corp.* v. *United States* (1939), 307 U. S. 125. In that case this Court concluded that the courts do have power to review any order in which the plaintiff urges "errors of law outside the Commission's final say-so," even though the order sought to be reviewed does not forbid or compel conduct on the part of the persons seeking review but is attacked because it does not forbid or compel conduct by a third person, saying at page 142:

> "An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted."

Counsel for the western railroads make a particular point as to the character of the order assailed. They argue that an initial suspension of a proposed change is purely discretionary so that a failure to suspend is

not subject to judicial review. Appellees have no quarrel with that contention. Western carriers then argue that the order here assailed is simply the equivalent of a refusal to suspend so that the administrative remedies of the appellees are not exhausted and there is no disposition of the case on the merits unless and until the appellees appeal to the Commission by way of formal complaint and that compiaint is dismissed. That is not true.

In so arguing, the western carriers overlook two important differences between a refusal to suspend in the first instance and the discontinuance of a suspension proceeding after full hearing. The first important difference is the full hearing. Such a hearing is provided so that all pertinent questions may be litigated and determined. Such a hearing would be a vain act if the Commission had it within its discretion to discontinue the proceeding after hearing even though the change in rates under investigation was in direct contravention of the statute.

The second important difference relates to the character of the power conferred. The initial suspension is necessarily discretionary since it is required without hearing and, therefore, should be ordered only if the Commission is reasonably convinced that the question involved is substantial and should be investigated at a hearing. The initial action of the Commission is not a determination as to the lawfulness of rate; it is only a determination that a proper case is presented for investigation by the method provided by Section 15(7). A refusal to suspend in the first instance does not purport to be an adjudication of rights claimed under the statute.

However, once the suspension is ordered and the investigation is instituted, Section 15(7) requires a "full

hearing." The section further provides that after that full hearing, whether completed before or after the change goes into effect "the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective." Here is a direct requirement that the Commission dispose of an investigation proceeding after full hearing just as if the issues involved had been presented by way of a formal complaint. The phrase "may make such order" must be read as mandatory and not as if the Commission had discretion to discontinue a proceeding without order, even though the proposed change were clearly disclosed to be in contravention of the governing statute. The word, "may" should be read as "shall" in recognition of the accepted canon of statutory construction that permissive words directed to courts or officers are imperative in those cases in which the public or individuals have a lawful claim to, or interest in, the exercise of the power so conferred.

The rule just stated was enunciated by this Court in the oft cited cases of *Mason et al.* v. *Fearson*, 50 U. S. 248, 259, and *Supervisors Rock Island Co.* v. *United States, ex rel. State Bank*, 71 U. S. 435, 445, 447. The same rule was applied in *Winsor Coal Co.* v. *Chicago & A. R. Co.*, 52 Fed. 716, which involved the construction of a state regulatory statute very similar to the Interstate Commerce Act and in *Arizona Corp. Commission* v. *Heralds of Liberty*, 17 Ariz. 462, 154 Pac. 202, 205, involving the powers of a state corporation commission.

The reference in the report on reconsideration to the possibility in a proper proceeding of prescribing proportional rates on ex-barge traffic lower than local rates (R. 54-5) is without significance insofar as the point under discussion is concerned. Presumably, the Commission re-

ferred to a proceeding in which appellees by formal complaint would request the exercise of the authority conferred by Section 6(11) of the Act. The issue in such a complaint case would be as to the reasonableness of such proportional rates. That, however, is one of the very issues in this case. Consequently, in the words of Mr. Justice Cardozo in *United States* v. *Chicago, M. St. P. & P. R. R. Co.*, 294 U. S. 499, 510:

> "This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come."

Furthermore, the Commission in this case disposed of issues under Sections 2 and 3(4) of the Act which would not be present in a formal complaint brought under Section 6(11) (b). Appellees are entitled to have those sections correctly construed and applied in this case. There is no reason why they should be compelled to begin another proceeding if the Commission should have acted in this case so as to prevent action by the eastern railroads which would be in derogation of their statutory rights.

B. THE INLAND WATERWAYS CORPORATION HAS AN INTEREST AND STANDING WHICH ENTITLED IT TO BRING AND MAINTAIN ITS SUIT IN THE DISTRICT COURT.

Inland Waterways Corporation brought its action in the District Court because it had been deprived of a correct application of Section 3(4) in the case before the Commission. Unless the injunctive process is available, appellee is without a remedy in the premises, no matter how arbitrary or capricious may have been the action of the Commission.

This appellee has a right to treatment from eastern

lines which will be non-discriminatory as compared with the treatment accorded other connecting lines. That right is enforceable by the Interstate Commerce Commission in a proceeding of the character in which was entered the order here assailed. If this appellee cannot use the injunctive process to reach an order by which it has been denied its statutory right because of an erroneous construction of the statute by which granted, the Commission will be free to apply its own standards, rather than those prescribed by the Congress.

In *Mitchell* v. *United States*, 313 U. S. 80, was involved an order entered by the Commission dismissing a complaint brought by a member of the colored race, complaining of discrimination in passenger accommodations. The Commission challenged the right of Mitchell to bring the suit. Upon that issue, this Court, speaking through Mr. Chief Justice Hughes, said (pp. 92-3):

> "Appellant was an aggrieved party and the negative form of the order is not controlling. * * * He presents the question of whether the Act does forbid the conduct of which he complains. * * *
>
> "The District Court had jurisdiction to review the action of the Commission and the question on that review was whether that action was in accordance with the applicable law."

The case of *Sprunt & Son* v. *United States*, 281 U. S. 249, and the other cases cited by appellants, are wholly inapposite since this appellee does not occupy the position of one who has previously received a preference, which preference is removed by the assailed order. Appellee, of course, receives no preference through the application of the proportionals to all traffic alike, but is merely thereby accorded equal treatment, and it only seeks to preserve this equality of treatment in comparison with other connecting lines, which equality is guaranteed to it by the

statute. The parties herein who stand in the same shoes as the appellant in the *Sprunt* case are the western rail lines, who are favored by the eastern railroads in the proposed tariffs, and who intervene in this case to preserve their preferential standing.

That a carrier does have the standing to maintain a suit such as this, regardless of the decision on the merits of the case, follows from the many cases in which orders of the Commission under this same Section 3(4) have been attacked in the courts. *Chicago, I. & L. R. Co.* v. *United States*, 270 U. S. 287. And in *New York & N. Rg. Co.* v. *New York & N. E. R. Co.*, 50 Fed. 867, a carrier successfully maintained a suit to enforce an order of the Commission granting relief from discrimination under Section 3(4) of the Act.

It is axiomatic that every right has its remedy, and, in case the Commission erroneously construes the statute, the only remedy of this appellee is a suit of this nature. Whether appellee can be deprived of its right to equality of treatment with other connecting lines upon the construction given the statute by the Commission is the issue in this case and the argument of the appellants on this point merely begs the question.

C. THE RAILROADS WERE PROPER DEFENDANTS IN THE DISTRICT COURT.

The decree of the District Court (R. 1677) enjoined the eastern railroad appellants "from acting upon the authority of the aforesaid order of the Commission, but said defendants are not restrained or enjoined from filing or posting any rates or tariffs, other than upon the authority of the aforesaid order." Where the injunction does no more than forbid action under the authority of an illegal order, those to whom authority is conveyed by the order

may be reached by an injunction even though the order is only permissive. It was so held in the *Chicago Junction case, Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, 269-70.

It is to be emphasized that the eastern lines are not enjoined from refiling the proposed change upon statutory notice at any time they so desire. The only thing forbidden to them is making effective the change *upon the authority of an illegal order*. They have no right to complain of that action by the District Court.

D. THE QUESTIONS PRESENTED IN THIS SUIT ARE QUESTIONS OF LAW, AND THEIR DETERMINATION BY THE COURT DOES NOT TRANSGRESS ON THE ADMINISTRATIVE DOMAIN.

The matter complained of is an order of the Commission which finds that a proposed change in rates is just and reasonable and not shown to be unlawful in violation of the Act. We appreciate that such an order is not subject to attack in court upon any question which Congress has committed to the Commission for determination, so long as the Commission acts within the powers conferred upon it by the statute. Consequently, appellees raise no question as to the weight to be given the evidence or as to the conclusions to be drawn therefrom, except to insist that certain evidence is legally irrelevant under a proper construction of the statute, and that certain findings are without any support in the evidence. Laying aside the exceptions which involve questions of law and not questions of administrative discretion, we accept as final all findings by the Commission which call for an expert and informed judgment in the field of rate-making, a field in which Congress has made the Commission, and not the courts, supreme.

This Court on many occasions has acknowledged the

propriety of injunctive relief where the administrative body committed errors of law similar to those of which we here complain. Without going into detail, we note that orders of the Commission were set aside in the following cases for reasons identical in principle with those on which appellees rely:

Lack of evidence. In *Florida E. C. R. Co.* v. *United States*, 234 U. S. 167, 186-8, the order was set aside because it was wholly without support in the evidence as to the rates of the appellant.

Lack of essential findings. In *Florida* v. *United States*, 282 U. S. 194, 215, the order was set aside because of a lack of findings as to basic or jurisdictional facts conditioning the power exercised. In *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504, an order prohibiting a proposed reduction in rates on coal because of a supposed disturbance of the general rate level was enjoined due to the absence of findings specifying the respect in which the proposed rates were unlawful. In *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454, 464, an order of the Commission requiring a change in reverse gears for locomotives was set aside because of a lack of findings that the gears ordered displaced occasioned peril to life or limb. In *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, the order was set aside because it lacked findings sufficient to show that the statutory standards had been properly applied.

Erroneous meaning accorded to words in the statute. In *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, 229, and in *Baltimore & O. R. Co.* v. *United States*, 277 U. S. 291, 299, 300, the orders were set aside because the Commission erroneously construed the word "practice" in

Section 15(1) of the Act. In *Interstate Commerce Commission* v. *Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14, the order was enjoined because the Commission erroneously misconstrued the phrase "to extend its line" in Section 1(21) of the Act. In *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, the order was set aside because the Commission gave an erroneous meaning to the words "*bona fide* operations" of Section 206(a) as applied to commodities transported by a motor carrier. In *United States* v. *New York Central R. Co.*, 263 U. S. 603, an order requiring railroads to issue interchangeable mileage coupon tickets was set aside on the ground that the Commission had given the statute a broader application than that to which it was entitled according to its terms. In *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, an order of the Commission establishing through rates which short-hauled the Missouri Pacific Railroad was set aside because the Commission had misconstrued Section 15(4) of the Act as applicable only in favor of the carrier in possession of the property. In *Texas & P.* v. *United States*, 289 U. S. 627, an order entered under Section 3(1) of the Act was set aside because the Commission erroneously considered a port of transshipment as if embraced within the word "locality" as used in that section.[19a]

Abuse of discretion. In *Interstate Commerce Commission* v. *Northern P. R. Co.*, 216 U. S. 538, an order establishing through routes and joint rates was set aside on the ground that the matter was not one for the Commission's discretion where it was shown, according to proper legal principles, that a reasonable and satisfactory through route existed. In *Mitchell* v. *United States*, 313 U. S. 80, an order dismissing the complaint of a colored passenger directed against discrimination in the matter of accommodations furnished was set aside on the ground that the

[19a] Since that case Section 3(1) has been amended so as to include a port.

Commission had overstepped the bounds of administrative or expert judgment in approving a discrimination predicated on the fact that the complainant was a Negro and that there were practical difficulties in providing the same accommodations for Negroes as for white persons.

Order predicated upon a consideration of facts which were not relevant as a matter of law. In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, an order directed to the reasonableness of rates under Section 1 was enjoined because predicated on economic, rather than transportation, conditions. In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 242, the order prohibited an elevation allowance when grain was treated, weighed, inspected, or mixed at the elevator of the one receiving the allowance. The Commission found such allowance unduly preferential by reason of the commercial advantages which thereby accrued to the elevator operator. That order was enjoined on the ground that such circumstances were not within those which the Commission was legally entitled to consider in determining whether the alleged preference was undue in violation of the statute. In *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 471, an order entered in an investigation and suspension proceeding prohibiting a reduction in rates was enjoined on the ground that the Commission had exceeded its powers by taking into consideration industrial conditions and economic advantages and then endeavoring to offset them through an adjustment in rates. In *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, an order requiring a reduction in a separately stated terminal charge was enjoined on the ground that the Commission had not treated with the charge in issue independently of other charges, but had predicated its order upon a consideration of the reasonableness of the through rate

produced by combining the terminal charge with prior charges for line-haul transportation. In *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247, an order entered under Section 3 of the Act directed to transit arrangements was enjoined because the Commission treated the act of the appellant carriers in joining in through routes and joint rates with connecting lines on whose latter lines preferential transit arrangements were maintained, as the equivalent of the appellants being responsible for the preferential arrangements. Mr. Justice Brandeis, who wrote the opinion in that case, characterized it in his dissenting opinion in *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461, 493, as one in which the Commission's order was set aside because it took into consideration facts which could not legally influence its judgment. In *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, an order denying a certificate of public convenience and necessity to a motor carrier was enjoined because the Commission predicated its finding as to *bona fide* operations upon facts as to the regularity and relative frequency of the transportation of particular commodities, a matter which this Court held was not controlling. In *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, 666, an order of the Commission requiring a reduction in rates was enjoined on the ground that "it is manifest that the Commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections * * *." (Sections 1 and 3 of the Act)

Failure to consider facts which were relevant as a matter of law. The general principle that an order of the Commission is invalid if it fails to act within the statutory authority is equally illustrated by cases in which the Commission has declined to give consideration to matters

which it was legally obligated to consider. In *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U. S. 144, the order was set aside because the Commission had refused to consider carrier competition as a distinguishing circumstance in applying Sections 3 and 4 of the Act. In *Brimstone R. & C. Co.* v. *United States*, 276 U. S. 104 117, an order fixing divisions of rates as between connecting carriers was set aside on the ground that the Commission had not given consideration to matters legally entitled to consideration under the governing statute. In *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461, 487, an order involving a question of valuation was set aside on the ground that the Commission had failed to consider certain elements of value which, as a matter of law, it should have considered.

Whenever an administrative body commits errors of law of the character exemplified in the foregoing cases, which errors are identical in principle with those of which appellees here complain, it is plain that "the commission in arriving at its determination departed from the applicable rules of law" (*Shields* v. *Utah, Idaho Central R. Co.*, 305 U. S. 177, 185), that the administrative body did not apply the statute in a "just and reasoned manner" (*Gray* v. *Powell*, 314 U. S. 402, 411), and that there is no "rational basis for the conclusions approved by the administrative body." (*Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 146)

Cases distinguished.

The cases dealing with the scope of judicial review, on which appellants rely, are not in point, since they did not involve errors of law similar to those involved in this case.

For example in *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, this Court, on the ground of ad-

ministrative finality sustained an order entered in *Chicago and Wisconsin Points Proportional Rates*, 10 M.C.C. 555, 17 M.C.C. 573, condemning as discriminatory under Section 216(d) of Part II of the Act (49 U.S.C., Sec. 316(d)) a different rate on less than truckload traffic received from freight forwarding companies than on freight received from other shippers at the same point. The Commission predicated its order on a finding that there was no dissimilarity in the conditions of transportation. The Commission confined its consideration to those circumstances which related *directly* to the physical services for which the differing rates applied. Neither the Commission nor this Court gave any consideration to differences in circumstances which occurred prior to the transportation for which the rates in issue applied. That was a fact case in every respect and did not involve the misconstruction of the statute, of which appellees here complain. If the Commission had construed the statute the same in this case as in that case, appellees in the instant case would have prevailed before the Commission.

In *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, the issues were primarily under Section 3(1) (*Grain Case Modifications* (1939), 231 I. C. C. 793, 794), and the physical services to which applied the rates and practices alleged to be unduly preferential were different from the physical services to which applied the rates and practices alleged to be unduly prejudicial. This is because the temporary stop and reshipment involved wholly different intermediate points. Whether this difference in the physical services was a substantial difference, within the meaning of Section 2, was within the competence of the Commission to decide.

Additionally, the Commission found there was a basic difference in the forms of the transits taken.

There was no claim as to lack of proof to support these findings as to the differences, nor was there any claim that the differences relied upon by the Commission, which related directly to the services involved, were beyond its authority to consider. The appellants in that case contended that when the facts relied upon by the Commission were considered, the ultimate conclusion should have been different than that announced by the Commission. This Court properly held that such a question is beyond the scope of judicial review. The case here is different in that it involves a lack of proof and also involves the contention that the Commission predicated its ultimate determination on matters which it had no right to consider under the statutes as properly construed.

II. The reasonableness of a separately stated proportional and reshipping rate must be tested independently and without merging it with prior charges.

Section 1(5)(a) of the Act provides that *all* charges made for any service rendered in the transportation of property shall be just and reasonable and every unjust or unreasonable charge for such service or *any part thereof* is prohibited and declared to be unlawful.

Section 6(1) of the Act requires carriers to publish and file with the Commission the *separately established rates and charges* applied by them to through transportation.

The report of the Commission on reconsideration did not deal with the separately established proportional and reshipping rates, as applied to ex-barge grain, on their own merits. On the contrary, the rate comparisons found in the report of the Commission (R. 52-3) are of the combined barge-rail combinations with the all-rail combinations. The Commission noted the differences between

such combinations and concluded that a barge-rail combination *higher* than the all-rail combination met the test of reasonableness. In testing the reasonableness of the rates in issue by the combinations which they produce, the Commission exceeded its statutory authority.

In *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 105, 109, was involved an order of the Commission requiring certain railroads to reduce from $2 to $1 per car their terminal charges for transporting livestock to the Union Stock Yards at Chicago. That terminal charge was a factor used to determine the through rate which the shipper should pay. In that case, the Commission did not treat the existing terminal factor of $2 per car on its own merits, but rather, combined that factor with the prior line-haul charges into Chicago and treated only with the reasonableness of the aggregate. This Court held such an approach to the issue was beyond the power of the Commission, and accordingly the order was enjoined, this Court saying at page 105:

> "If the terminal charge be, in and of itself, just and reasonable, it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes a total charge to the shipper unreasonable."

To make plain the principle for which we are contending, let it be assumed that the Pennsylvania Railroad had established the reasonableness of the proposed change, if the separately established charge was considered on its own merits. Further, assume that the Commission had, nevertheless, declined to permit any increase therein on the ground that the increased separate rate of the Pennsylvania, when added to an unregulated barge rate of Mechling from Morris, or when added to the inbound rail

rate of the Rock Island Railroad from the same origin, or when added to the rate which happened to be maintained at the time via lake steamer from Duluth, would produce an unreasonable total charge. In such a situation, it is inconceivable that this Court would permit the Pennsylvania to be deprived of a rate fair and reasonable to it, considering only the services rendered by it east of Chicago.

There is no possible interrelation between the inbound barge rates charged by Mechling and the reshipping rate charged by the Pennsylvania. If we were to assume that such an interrelation does exist, then an overnight[20] change in the Mechling inbound rate would apparently make the separately established outbound rate of the Pennsylvania either too high or too low, dependent upon whether Mechling reduced or increased his inbound rate. There is, however, no rational basis for making reasonable compensation to the Pennsylvania for its independent outbound railroad service depend upon the measure of the rate charged by Mechling for an independent inbound barge service. It would be equally irrational to hold that reasonable compensation to the Pennsylvania for its services should be made dependent upon the measure of the inbound rate maintained by the Rock Island Railroad from some western origin to Chicago.

There may be cases in which the Commission apparently took action of the character just characterized as irrational. (*Southwestern Millers League* v. *A. T. & S. F. Ry. Co.*, 225 I. C. C. 195, 227 I. C. C. 795) A careful analysis of such cases will show, however, that the real issue before

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[20] Under the exemption contained in Section 303(b) of Part III of the Interstate Commerce Act, the transportation which Mechling conducts is not subject to regulation, nor is he required to file rates thereon, if the commodities contained in a tow consist of not more than three bulk commodities.

the Commission was as to the reasonableness of the aggregate charge, the proceedings involving, in the one case, the through rate as composed of the inbound charge and the outbound charge. In such cases there were through routes by common arrangement, and the action of the Commission simply amounted to the prescription and apportionment between carriers, who were all defendants in the case, of a reasonable through rate. Obviously, that is a different situation. Here, the issue as framed by the order of suspension and investigation was confined to separately established outbound rates from Chicago.

In *Atchison, T. & S. F. R. Co.* v. *United States* (1929), 279 U. S. 768, the appellant argued, as does the Commission in this case, that the total through charge should be considered, even if the issues as framed involved only a separately established proportional. This Court rejected the legal proposition just stated and held that the lawfulness of the proportional rate there in issue should be considered on its own merits as a separately established rate in the light of the service rendered thereunder and without being combined with a rate and service on the other side of the market. Mr. Justice Brandeis, speaking for the Court, observed that if a proportional, when applied on a transit shipment, is truly a part of a through rate, the fact would be without legal significance, and went on to say, at page 776:

> "The Commission's power to declare rates unreasonable applies alike to all rates, be they joint, local or proportional. The Commission may, and in controversies involving through rates often does, deal with one factor only of the combination of rates which make up the through rate. And that factor may be a proportional rate."

The statement just quoted is referenced to a footnote in which is cited *Cairo Board of Trade* v. *Cleveland, C. C.*

& St. L. Ry. Co., 46 I. C. C. 343, and other cases, where the Commission has announced a similar rule.[21]

At page 779, Mr. Justice Brandeis said (parenthetical matter added):

> "When the outbound shipment from Kansas City is made the grain goes forward on a new bill of lading at the balance of the through rate. Obviously, this practice cannot convert the independent shipment of grain from Kansas City (the reshipping point) to the gulf via the Southern into a through movement from Dodge City (the country origin) to the gulf."

In *Great Northern R. Co. v. Sullivan* (1935), 294 U. S. 458, 462, this Court, speaking through Mr. Justice Butler, took pains to note that the Commission "may determine whether a proportional, constituting a part of a combina-

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[21] In the *Cairo Board of Trade case*, the Commission employed reasoning which is equally applicable to the case at bar, saying (pp. 350-1):

> "• • • Reshipping rates are not merely divisions of through rates, but are separately established rates generally published by carriers other than those engaged in the inbound movement and without the concurrence of the latter; and the point of reshipment is a rate-breaking point. A change in the reshipping rates, even though it may affect the through charges, will have no effect upon the inbound rates. The inbound carriers have a right to secure reasonable compensation for their part of the haul by reasonable inbound rates. The reasonableness of such inbound rates is in no manner contingent upon reshipping rates. Furthermore, inbound rates used in connection with reshipping rates generally serve also as local rates. Hence they are subject to review independently of the outbound rates. An excessive reshipping rate might produce a reasonable through charge in connection with an unduly low inbound rate and vice versa. It can not properly be argued that a proposal to increase unremunerative reshipping rates could be denied upon the ground that the through charge composed of an excessive inbound rate and the unremunerative reshipping rate is just and reasonable. The converse must also be true, namely, that shippers may not upon like ground be denied relief from unreasonable or unduly prejudicial reshipping rates. This is also true as to proportional rates that are applicable to shipments going or from beyond and which are not limited as applying only on shipments from or to designated points or territory. Each of such rates must be judged upon its individual merits."

tion rate, violates Section 1 without passing upon the validity of the rate as a whole."[22]

III. The Commission exceeded its authority in passing upon the separately established proportional and reshipping rates in issue, in that it construed Section 2 of the Act as if the circumstances and conditions to be considered thereunder included the measure of the inbound rate, the length of the inbound haul, and the nature of the inbound service.

Section 2 of the Act prohibits unjust discrimination and, at the same time, defines with preciseness the facts which must be present in order to render the discrimination *unjust*. That section leaves to the determination of the Commission only the question of whether a particular situation is embraced as a fact within the prohibition. In this respect it is different from other sections of the Act which do not define what constitutes an unreasonable or a prejudicial rate. Unjust discrimination is defined as the charging of one person more than another person for a like and contemporaneous service in the transportation of a like kind of property under substantially similar circumstances and conditions.

By its terms, Section 2 operates within a very narrow field. The very narrowness of that field leaves little room for administrative discretion. In contrast therewith, Sec-

[22] In the *Great Northern Railroad case*, the suit was to enforce a reparation award based on a finding that a proportional rate assessed on past shipments damaged the shipper because in excess of a maximum reasonable rate. This Court held that the award could not be enforced because the award was not supported by a finding that the total charge, of which the proportional was only a part, was unjust and unreasonable. In so disposing of the case, this Court distinguished between the power of the Commission in awarding damages and the power of the Commission in finding a proportional rate to be unreasonable for the future. Consequently, appellants miscite that case, when they assert it is controlling upon the issues involved in this case, which issues relate only to the future and involve no question of damages in the past.

tion 3(1) is extremely broad and, while it prohibits undue preference and prejudice of any character whatsoever, Congress did not attempt to define in that section the facts to be considered in determining whether a particular rate relation is in violation thereof.

On the question of the similarity of services rendered on ex-barge, ex-lake and ex-rail grain, the Commission finds that "in each instance the physical carriage beyond the reshipping point is substantially the same." (R. 54)

The Commission avoids the conclusion that Section 2 is violated under such circumstances by saying (R. 54):

> "As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are of course determined by the measure of the inbound and through rates and properly may vary according to the relative length and nature of the inbound and through service."

It has been repeatedly held by the Courts, as well as by the Commission itself, that the only circumstances which may be considered in passing upon an alleged violation of Section 2 are those which directly relate to the service for which the charge is assessed, any difference in circumstances arising either before or after, or independently of, that particular transportation service being excluded from consideration.

The leading authority in the Commission's decisions, *Chattanooga Packet Co. v. I. C. R. R. Co.* (1915), 33 I. C. C. 384 (entire Commission), is squarely on all fours in its facts with the present case and also involved the identical question of statutory construction which the instant case involved. In that case the southern carriers had restricted their proportional rates against ex-water traffic and a formal complaint was brought. The Commission

found that the restrictions constituted unjust discrimination and said at page 392 (emphasis supplied):

> "The fact that the proportional rates to and from the Ohio River are compelled by competition can have no bearing upon our determination of the issue of unjust discrimination. The 'like circumstances and conditions' referred to in section 2 of the act are those which arise within the field of haulage, and do not include competition. *Wight* v. *U. S.*, 167 U. S. 512; *I. C. C.* v. *A. M. R. R. Co.*, 168 U. S. 144. The shippers who desire to avail themselves of the water-and-rail route must be given *equal treatment* with those who ship all-rail. Any discrimination which exists must not exceed that which is warranted by the *differences in the circumstances and conditions of the haul over defendants' lines.*"

And at page 393:

> "We are of the opinion and find that, by restricting their proportional rates to traffic routed over their southern rail connections, defendants are *unjustly discriminating* against complainant and against shippers who desire to route their goods over complainant's boat line."

A later case to the same effect is *Raw Sugar, New Orleans to Gramercy and Reserve, La.* (1935), 206 I. C. C. 231, in which the Louisiana & Arkansas Railway proposed a rate on raw sugars from New Orleans to Gramercy of one cent per hundred pounds when the sugar refined therefrom was reshipped via its line, the usual local of 3.5 cents to apply on the inbound movement if the refined sugar were reshipped via any other line, including the Federal Barge Lines. This was condemned by the Commission on the authority of the *Chattanooga Packet Co.* case.

Other cases in which the Commission has condemned a difference in separately established rates, because con-

ditioned on the traffic having had a prior or a subsequent haul via some particular type of carrier or route, include *Bascom Co.* v. *A. T. & S. F. Ry. Co.* (1909), 17 I. C. C. 354; *Rosenbaum Bros.* v. *L. & N. R. R. Co.* (1911), 22 I. C. C. 62; *Birkett Mills* v. *D. L. & W. R. R. Co.* (1927), 123 I. C. C. 63; *Ex-River Grain and Products to Mississippi Valley* (1931), 177 I. C. C. 206; and *Restriction of Proportional Rates* (1930), 161 I. C. C. 113.

The legal principle reflected by the finding of the Commission in this case is squarely in the face of the construction accorded Section 2 by this Court, except in one early case which must be considered to have been overruled by subsequent decisions.

The early case referred to is *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, in which the Interstate Commerce Commission sought to compel obedience to an order requiring the Texas & Pacific Railway to charge the same rate on import traffic received at New Orleans and reshipped to San Francisco as on domestic traffic shipped from and to the same points. The order entered was predicated on both Sections 2 and 3 of the Act. The carrier defended on the ground that competition with ocean steamers operating around Cape Horn, or by transshipment across the Isthmus of Panama, forced it to maintain an import rate below the normal local basis. This Court held that *such competition*, which arose outside of the field of haulage, made the circumstances dissimilar so as to take the case out of the purview of Section 2.

However, in *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U. S. 144, 166, this Court, speaking through Mr. Justice Shiras, who also wrote the opinion in *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, *supra*, took pains to announce a construction

of Section 2 at complete variance with that announced in the earlier case.

Texas & P. Ry. Co. v. *Interstate Commerce Commission, supra*, has never been cited by this Court in any subsequent case as authority for the construction there given Section 2.

All other cases in this Court, as well as in the lower Federal courts, have followed the construction of the Act for which we contend, and, in so doing, have given the Section 2 phrase "substantially similar circumstances and conditions," the same meaning as the English courts gave to a similar phrase in a comparable section, "the equality clause," [22a] in the English regulatory statute, prior to the enactment of the Interstate Commerce Act.

The earliest case in this Court under Section 2 is *Interstate Commerce Commission* v. *B. & O. R. Co.*, 145 U. S. 263. In that case this Court declined to enforce an order of the Commission entered under Section 2 which prohibited party rate tickets if sold on a basis which reflected lower fares than would be assessed in the case of an individual passenger. On the analogy of the retail versus wholesale transaction, this Court held that the services in the transportation of ten persons traveling together were not identical with the services rendered in the transportation of an individual passenger. It is to be emphasized that the distinguishing circumstances relied upon by this Court as a ground for invalidating that order related directly to the physical service for which were assessed the fares in issue.

In *Wight* v. *United States*, 167 U. S. 512, 518, a carrier made a cartage allowance to one shipper at Pittsburgh because that shipper was located on a competing line, and refused to make a similar allowance to another shipper not so located. The only section of the Act involved was Section 2. The carrier defended on the ground

[22a] Section 90 of the Railway Clauses Consolidation Act of 1845, 8 & 9, Vict., ch. 20, as reproduced on page 116 of Appendix "A" hereto.

that the difference in the competitive situation constituted a dissimilarity in circumstances and conditions. This Court rejected that defense, saying that the phrase "substantially similar circumstances and conditions" found in Section 2 refers "to the matter of carriage."

In *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 253-4, this Court sustained an order of the Commission which forbade carriers from discriminating against forwarding companies by making the ownership of property a condition precedent to the application of the carload rate. There, as here, the physical carriage was identical. However, prior to the beginning of that carriage, the forwarding companies in competition with the railroad carriers gathered up small lots from individual shippers and brought them to a railroad station to be forwarded in a consolidated carload. Rail carriers endeavored by means of a rate penalty to discourage that competition. The order of the Commission condemned that penalty as unjustly discriminatory. That order was sustained by this Court on the ground (pp. 253-4) that Section 2 of the Act—

> "did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated."

Every matter relied upon by the Commission in the instant case as a differentiating circumstance occurs before the service of the eastern railroads begins.

The next case involving Section 2 is *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 225 U. S. 326. In that case the order of the Commission required railroads to maintain the same rates on railroad fuel as on commercial coal consigned to a particular destination, regardless of the fact that the railroad fuel, after

reaching the destination, would move beyond as company freight to refueling stations located on the line of the carrier to whom the railroad fuel was consigned. The railroads urged that the added movement as "company freight" beyond the point at which delivered, such movement being required to get the coal to point of use, constituted a difference in circumstances. This Court, speaking through Mr. Justice McKenna, sustained the order of the Commission as a proper application of Section 2, holding that the differentiating circumstances on which the railroads relied were "extraneous to the transportation," and consequently not to be considered as constituting a dissimilarity of circumstances and conditions.

It was further said that (p. 343):

> "Such features do not affect the carriage, qualify or alter the essential service, which is to get an article from one place to another. The greater or less inducement to seek the service is not the service."

In the course of his opinion, Mr. Justice McKenna gave the following clear explanation of why conditions and circumstances other than those directly related to the carriage should not be considered (p. 342, emphasis supplied):

> "Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and interest after, transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, *who are entitled to equality of charges.*"

In *Atchison, Topeka & S. F. Ry. Co.* v. *United States* (1929), 279 U. S. 768, this Court sustained an order of

the Interstate Commerce Commission entered in *Grain and Grain Products, I. & S. Docket 2813*, (1927), 129 I. C. C. 261, finding not justified a proposal of the Santa Fe Railroad to charge from Dodge City, Kansas, to Kansas City, Missouri, a higher rate on grain subsequently reshipped via some line other than the Santa Fe than on grain reshipped via the Santa Fe. In the course of its opinion this Court, speaking through Mr. Justice Brandeis, said (pp. 773-4):

> "* * * it is discriminatory to make that additional charge only if the outbound shipment is over one of several possible railroads."

In *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 253-4, cited above this Court held that Congress must be presumed to have intended the same meaning for the phrases used in Section 2 as the English courts had accorded similar phrases in the "equality clause" of an earlier English statute, on which Section 2 was modeled.[23] One of those English cases, *Great*

[23] "It is not open to question that the provisions of Section 2 of the act to regulate commerce were substantially taken from Section 90 of the English railway clauses consolidation act of 1845, known as the 'equality clause.' *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 222, 40 L. ed. 940, 948, 16 Sup. Ct. Rep. 661, 5 Inters. Com. Rep. 405. Certain also is it that, at the time of the passage of the act to regulate commerce, that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods, and not the person of the sender; or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western R. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226; *Evershed* v. *London & N. W. R. Co.* (1878) L. R. 3 App. Cas. 1029, 5 Eng. Rul. Cas. 351, and *Denaby Main Colliery Co.* v. *Manchester, S. & L. R. Co.* (1885), L. R. 11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the English equality clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act; certainly to the extent that its interpretation is involved in the matter before us. *Wight* v. *United States*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S. 144, 166, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45." (220 U. S. 235, 253-4)

Western R. Co. v. *Sutton* (1869), L. R. 4 H. L. 226, involved an effort on the part of a railroad to charge more on the traffic of an intercepting carrier than on other traffic transported from and to the same points. In the course of his opinion, Mr. Justice Blackburn said (p. 245):

> "* * * the fact that the Plaintiff was a rival carrier does not, in itself, make a difference in the circumstances such as to justify a difference in the charge under the statute; it rather makes against the Defendants as supplying a motive for an attempt to evade the statutable provision."

An English case, which touches closely the issue in the present case, is *Denaby Main Colliery Company* v. *Manchester, S. & L. R. Co.* (1885) L. J. 55 Q. B. 181, 187, 189, L. R. 11 App. Cas. 97, 116, 120, 6 Eng. Ry. & C. Traf. Cas. 133, 138, 141, affirming L. R. 14 Q. B. 209, 224, 4 Ry. & Car. Traf. Cas. 437, 452. A number of separate rate situations were involved in that case. The one of chief interest to us involved the granting of a greater allowance on coal from a given origin to Grimsby if the coal went beyond by the Hamburg-American Line than on coal from and to the same points going beyond Grimsby by other steamer lines. The question for determination was as to whether this difference in lines used beyond the port made the circumstances unlike so as to make the equality clause inapplicable. That question was answered in the negative by the Queens Bench Division, by the Court of Appeals, and finally by the House of Lords. When the case was before the Court of Appeal (L. R. 14 Q. B. 209, 224), LINDLEY, L. J., at page 452, said:

> "* * * the expression 'under the like circumstances' has been the subject of decision, and must now be taken to mean under like circumstances as regards the services performed by the railway company in receiving, carrying, and delivering the goods."

This construction was approved in the House of Lords, Lord Blackburn stating (L. R. 11 App. Case 97, 120) (emphasis supplied):

> "* * * the obligation to charge, in respect of goods of the same description, equally, is imposed if they are 'under the same circumstances,' and that the circumstances are those *relating to the carriage of the goods*, * * *."

In the same forum the Earl of Selborne said (p. 116):

> "The motives and reasons for making these allowances are plainly not material, as against the appellants' claim to have their coals carried on the same terms."

We respectfully submit that the phrase "under substantially similar circumstances and conditions" must be construed, *as a matter of law*, as relating only to the route, expense, and physical conditions surrounding the carriage between the points where the rate in question applies.[24] If we are correct in this, the Commission proceeded upon an erroneous principle of law and its order is void and must be set aside.

None of the appellants seeks to distinguish or to explain the authorities above cited. The argument by which appellants seek to avoid the force of these authorities may be summarized in three steps as follows:

(1) That proportional rates have been long known to the law, and their validity is predicated on the proposition that the services under a proportional rate are unlike the

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[24] The editors of the United States Supreme Court Reports Law Edition, in reporting *Interstate Commerce Commission* v. *D. L. & W. R. Co.*, 220 U. S. 235, 55 L. ed., 448, 450, report counsel for the Government and for the Commission as expressing the legal principle for which we contend in the following language:

> "As used in the English acts, the words 'same description' and 'like description' exhaust themselves upon the traffic and the words 'like circumstances' exhaust themselves upon the route, expense, and risk of carriage; and none of those phrases can be extended to the personal qualities of the party who makes the shipment."

services under a local rate between the same points, since the former is only a part of a through service, while the latter is a complete service in and of itself.

(2) That the Commission has often approved proportional rates from a given reshipping point to a common destination which vary dependent upon the origin or the origin territory of the inbound traffic. *Central Pennsylvania Coal Producers Association* v. *B. & O. R. Co.*, 196 I. C. C. 203, 235, is cited, in which the Commission held:

> "Transshipment rates, like proportional rates, may vary between the same points so as to reflect, to some extent, the proportion of the through charges that the service rendered thereunder is of the entire transportation service performed."

It is said that when the origins are different, the services rendered from a common reshipping point to a common destination are different on the traffic from one origin than on the traffic from the other because different parts of different aggregate services are involved.

(3) As a final step in the argument, appellants contend that a difference in the *methods* of carriage from a common origin to the reshipping point as well as a difference in the *charges* assessed for such inbound hauls are analogous to a difference in origins so as to provide a lawful predicate for a difference in outbound reshipping rates.

The mere statement of the third step in the reasoning of the appellants discloses a complete lack of the very analogy relied upon.

For the purposes of this case, it is unnecessary to pass upon the propositions stated in either (1) or (2) above since the violation of Section 2 of which appellees complain does not involve a difference in proportional or reshipping rates made dependent on a difference in the origins from whence the inbound traffic moves. The rates

proposed, which the Commission approved as just, reasonable, and not otherwise unlawful, do not condition the restriction against ex-barge traffic on the origins of the barge movement; rather such restrictions are conditioned only on the fact that the inbound move is via the Illinois waterways.[25] Consequently, the real issue is whether the difference between an inbound move by barge over the Illinois waterways on the one hand and an inbound move via rail from a common origin on the other hand constitutes a dissimilarity of circumstances and conditions within the meaning of Section 2.

The reasoning, on which the Commission has approved proportionals which vary according to origins, affords no support for the construction of the Act advocated by the appellants. This is because the service rendered by the Pennsylvania Railroad in the reshipment of grain from Chicago to New York constitutes the *same* portion of a through service from Kansas City, Mo., regardless of whether the traffic is brought to Chicago via the Rock Island Railroad, or via the Santa Fe Railroad, or via the Inland Waterways Corporation.

Furthermore, the difference between the inbound rate of the Inland Waterways Corporation, on the one hand, and of the Rock Island, on the other, cannot possibly bear upon the level of the reshipping rate which the Pennsylvania Railroad is entitled to collect from the outbound shipper of ex-barge grain. That difference in inbound charges is so wholly extraneous to the services of the Pennsylvania Railroad that neither in logic nor in law can a difference in the outbound shipping rates be predi-

[25] Inland Waterways Corporation uses the Illinois waterways to reach Chicago regardless of the origin of the grain. Exhibit 63 shows that such grain has in fact originated at river ports in the States of Missouri, Iowa, and Illinois. (R. (ex. vol. p. 101) The affidavit of the general traffic manager of this appellee shows that in 1939, 1940, and 1941, the grain transported to Chicago originated at river points in the States of Illinois, Missouri, Kansas, and Tennessee. (R. 1707-8)

cated thereon. In further development of this point, we respectfully refer the Court to the comments found in the dissenting opinion of Chairman Eastman (R. 55-76), and particularly to his discussion of proportionals which vary depending on origins of the inbound traffic. (R. 65-8)

Insofar as ex-barge versus ex-lake grain is concerned, there is a difference in the matter of origins. If the tariffs predicated the difference in the outbound rates on that difference in origins, it would then be necessary for this Court to say whether Section 2 permits such an adjustment. However, since the tariffs are predicated only on a difference in the waterways used, that is, whether via the Illinois waterways or whether via the lake, regardless of origins, it is not necessary, even as to ex-barge versus ex-lake grain, to enter upon a discussion of the legality of proportionals which are made to vary according to the the origin of the inbound traffic. Parenthetically, in *Atchison T. & S. F. R. Co.* v. *United States*, 279 U. S. 768, 781, the appellant urged that if the proportional proposed by it, conditioned on the traffic going out over other railroads, was to be condemned, then the Commission should have suspended and ordered cancelled the proportionals of other lines which were made to vary according to the origins of the inbound traffic. However, this Court held that that question was not subject to review in that case. That is as close as this Court has come to considering the legality of varying proportionals under Section 2.

There is a case antedating the Interstate Commerce Act, *Union Pacific Ry. Co.* v. *United States*, 117 U. S. 355, 363, in which this Court was called upon to say, when construing the charter of the appellant, that the service rendered in transporting local passengers between two points is not "identical" to the service rendered in transporting through passengers between the same point who

began or terminated their journey beyond. In that case, however, this Court was dealing with a claim of the appellant against the United States and was not construing a statute, such as Section 2, which has been repeatedly judicially construed so that the phrases contained therein have an accepted legal meaning no longer open to dispute. Furthermore, there was no claim in that case that the service of transporting one through passenger between given points was different from the service of transporting another through passenger between the same points because of a difference in the carriers on which the passengers travelled to the point of connection with the Union Pacific.

Finally, it should be emphasized that we do not here ask the Court to substitute its judgment for that of the Commission. Rather, we urge that there is no room for the exercise of judgment on this fundamental charge of discrimination. In this respect, the case is similar to the case of *Mitchell* v. *United States*, 313 U. S. 80, wherein the Court set aside an order of the Commission dismissing a complaint against discrimination in the matter of passenger accommodations provided for a colored passenger. In that case this Court said, p. 98:

> "On the facts here presented, there is no room, as the Government properly says, for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act."

IV. The Commission did not correctly apply the statute in that it held that a difference in the outbound rates on ex-barge traffic, on the one hand, and ex-rail and ex-lake, on the other, was not discriminatory as between connecting carriers in violation of Section 3(4); differences in the measure of inbound rates, in the lengths of the inbound hauls, and in the nature of inbound services do not justify difference in the outbound rates.

A. THE COMMISSION FAILED TO APPLY SECTION 3(4) ACCORDING TO ITS TERMS AS AMENDED BY THE TRANSPORTATION ACT OF 1940.

At the time this case was heard by the Commission, the port-to-port service of the appellee, Inland Waterways Corporation, in the transportation of bulk grain was not subject to the Interstate Commerce Act because it was not conducted under a common arrangement for continuous carriage with rail lines beyond.[26] At that time, the Commission construed Section 3(3) (now 3(4)) of the Act, which forbade one carrier from discriminating in its rates as between connecting lines, as providing protection only for connecting lines subject to regulation as to the particular traffic involved. This was on the premise that the phrase "such connecting lines" referred back to the phrase "carriers subject to the provisions of this Act." *American Hawaiian S. S. Co.* v. *Erie R. Co.* (1929), 152 I. C. C. 703, 708.[27] In a prior case involving issues

[26] Prior to the passage of the Transportation Act of 1940, Section 1(1)(a) of the Act provided that common carriers by water were subject to regulation by the Commission only when they were common carriers engaged in the transportation of property partly by railroad and partly by water when both are used under a common arrangement for continuous carriage or shipment. Compare *United States* v. *Munson Steamship Line*, 283 U. S. 43.

[27] In the case cited, the Commission observed that the construction accorded the statute was consistent with *Capehart & Smith* v. *L. & M. R. Co.* (1890), 4 I. C. C. 256, which the Commission said had been adhered to continuously since that date. That statement in the case cited is erroneous since, in a number of cases decided between 1890 and 1929, the Commission had treated Section 3(3) as prohibiting discrimination against a connecting water carrier, even in the absence of a common arrangement for continuous transportation. See *Chattanooga Packet Co.* v. *I. C. R. R. Co.*, 33 I. C. C. 384, 391, and cases

similar to those involved in the instant case, relief as to this appellee under Section 3(3) (now Section 3(4)) was withheld upon the construction of the statute just stated. *Ex-River Grain from St. Louis to the South* (1934), 203 I. C. C. 385, 391. While the report of Division 2 in this case did not deal with the merits of the case, it took occasion to mention that construction of the statute (R. 18, p. 363) but for some unexplained reason did not note that the statute had been amended in the meantime so as to make inapplicable the cases cited by it when commenting on the contentions of this appellee. That amendment to the statute, which occurred prior to the report of Division 2,[27a] was accomplished by the Transportation Act of 1940. (54 Stat. L. 949) By that Act, Congress renumbered Section 3(3) as Section 3(4), and in addition, added a sentence thereto reading as follows:

> "As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to Part III."

By this amendment the Congress intended to provide for common carriers by water subject to Part III the same protection against discrimination by connecting rail carriers as has always been provided in paragraph (3) of Section 3 for the benefit of all carriers subject to Part I. Having ordained a new order by bringing common carriers by water within the regulatory powers of the Commission, the Congress thus imposed upon the rail carriers a new duty to refrain from discriminating in their rates between connecting water lines, or between connecting rail and water lines, as well as between connecting rail lines.

To complete the picture, Section 305(d) of the Interstate Commerce Act, as amended, was enacted to impose upon common carriers by water the same duty with respect to

[27a] On page 54 of brief counsel for the Commission state that the Transportation Act of 1940 became effective *after* the report of Division 2. That is not true.

discrimination between connecting common carriers by railroad, as is imposed on the rail carriers in Section 3(4). This section is in exactly the same terms as is Section 3(4), and the result is to require both common carriers by water and common carriers by railroad for the future to accord equal treatment to all their connecting lines, of whatever character. Historical differences are to be forgotten, and it matters not under the terms of the statute whether in the past discriminations between connecting lines have been one sided or which type of transportation has, in this respect, held the upper hand; for the future, each mode of transportation named in these sections must treat connecting lines via the other mode of transportation exactly as it treats its kindred connecting lines.

The substantive provisions of the present Section 3(4) have been a part of the statute continuously since the enactment of the original Act to Regulate Commerce (24 Stat. L. 380). In the original Act, these provisions were contained in paragraph (2) of Section 3, which became paragraph (3) of Section 3, as amended by the Transportation Act, 1920 (41 Stat. L. 479). The many decisions under these early provisions of the law are uniformly harmonious with and support the contention of appellee herein.

The earliest application of this provision in a judicial proceeding is found in *Cutting* v. *Florida Ry. & Nav. Co.*, 30 Fed. 663, 665, which involved a petition by a steamship line filed in a railroad receivership case. The petitioner sought an order directing the receiver to cease discrimination between petitioner and a competing steamship line by giving a lower rate on traffic brought to the port by the one than by the other. The petition was filed before but decided after enactment of Section 3; the receiver immediately reformed his tariffs so as to make no discrimination

between the competing steamship lines. In this situation, the Court only gave general instructions to the receiver, including the instruction that "He will not discriminate, in his rates, charges, and facilities, for or against the Clyde line or the Mallory line, but will give to both equal rates and facilities for trade and travel, for equal service, from all points."

In *The N. Y. & N. Ry. Co.* v. *The N. Y. & N. E. R. R. Co.*, 4 I. C. C. 702, The New York & Northern Railway complained, *inter alia*, that the defendant maintained discriminatory rates in favor of traffic handled by the Housatonic Railroad. In discussing the language of Section 3(2), now Section 3(4), the Commission stated at page 720 of its report:

> "When, therefore, the statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the statute it is only a meaningless enactment."

This interpretation of the law was judicially affirmed by the Court in *The New York & N. Ry. Co.* v. *New York & N. E. R. Co.*, 50 Fed. 867, which was a successful proceeding to enforce the order entered by the Commission in the above case.

In *Augusta S. R. Co.* v. *Wrightsville & T. R. Co.*, 74 Fed. 522, the Court was confronted with a situation similar in every essential respect to that here presented. The plaintiff in that case, Augusta Southern Railroad, complained that the defendant, Wrightsville & Tennille Rail-

road, demanded a charge of $2.76 per ton to render precisely the same transportation service on freight which had received a previous transportation by plaintiff as freight which had received a prior transportation by plaintiff's competitor, The Central of Georgia Railway, on whose freight defendant charged only $2.40 per ton. The defendant in that case interposed the defense that it did not connect with the plaintiff, which defense is echoed in the argument of the defendants herein. As to this, the Court noted that the defendant had no more connection with the Central of Georgia than it did with plaintiff's railroad, which observation is equally applicable to the situation herein, where the connection between the appellant railroads and the lake carriers is precisely the same as that maintained with this appellee.

In granting the relief sought, the Court held that it had the power to prevent the defendant from "charging for such service rates so unreasonable as to prohibit the shipments of interstate freights by the complainant's road; thus compelling all such freights to be shipped over the road in whose favor the discrimination is made."

Chattanooga Packet Co. v. *I. C. R. R. Co.*, 33 I. C. C. 384, involved a complaint by a common carrier on the Tennessee and Ohio rivers against the railroads operating north of the Ohio River, based upon precisely the same discriminatory measures as have been taken by the eastern railroads herein against this appellee. At page 384 of the Commission's report in that case, the essential facts are stated thus:

> "On traffic routed via the rail carriers connecting Chattanooga with the Ohio River defendants apply proportional class and commodity rates to and from Ohio River crossings, but on that routed via complainant's boat line they apply the local rates to and from the river points at which the interchange is made,

which are upon a higher basis than the proportional rates."

While the complaint in that case raised issues under Sections 1 and 2 of the Act, which were also decided in complainant's favor, we here emphasize only the interpretation of the then provisions of Section 3(2), which were in substance the same as the present provisions of Section 3(4) except for the sentence added in 1940. At page 391 of its report, the Commission there observed:

> "By the provisions of section 3 carriers are prohibited from charging more for traffic between the same points routed over one connecting carrier than for that routed over another, unless the service which they perform is different in the one case than in the other."

In granting the relief sought, the Commission further observed at page 392:

> "If carriers are permitted to apply higher rates for the same service on traffic routed over connecting water lines than on traffic via their all-rail connections, they will be in a position to destroy all water competition and to deprive shippers of the advantage of their location upon navigable waters."

While the amendment of Section 3(4) was called to the attention of Division 2 prior to its report, it made no application thereof. In fact, Section 3(4) is not even mentioned in the report of Division 2. Consequently, this appellee filed its petition for reconsideration and rehearing which is reproduced in the record at pages 38-45, inclusive, to call the attention of the Commission to the change in the law and to the right of this appellee to receive the protection contemplated by the statute as amended after the hearings were concluded. The report of the Commission on reconsideration took no notice of

that petition or of the change in the law other than by the following statement (R. 49):

> "The only protestant seeking a further hearing is the Federal Barge Lines, which points out that since the hearing it and certain other barge lines have filed their port-to-port grain rates with us, but this is a fact of which we can take official notice. Certain of the parties ask for reargument. Under the circumstances, we think that no useful purpose would be served by further hearing or reargument and that the matter can properly be disposed of in this report with a view to determining what, if any, modification or clarification of the division's findings should be made on reconsideration of the record in the light of the petitions and replies and our prior decisions."

We emphasize that the Commission made no mention of the Transportation Act of 1940 and that there is no indication in its report that it disposed of the case in the light of the amendments to the Interstate Commerce Act accomplished thereby. This disregard of the change in the substantive law is sufficient to condemn the assailed order.

There is no reasonable theory upon which an eastern line, such as the Pennsylvania Railroad, can dictate to this appellee what it should charge for the transportation of grain via barge from Kansas City to Chicago. Nor is there any reasonable theory upon which the Pennsylvania Railroad can insist on a higher reshipping rate on the traffic of a connecting carrier which happens to be a water line than it charges on traffic from a connecting carrier which belongs to the railroad family. Yet the construction of Section 3(4) adopted by the Commission in this case confers those powers upon the eastern railroads. That is to say, the Commission holds that it is lawful for an eastern railroad to make its proportional or reshipping rates differ as between connecting carriers from a common origin by reason of a difference in the inbound rates to the re-

shipping point and by reason of a difference in the nature of the inbound services. That holding is based on a misconstruction of the governing statute so that the District Court was right in enjoining the order.

The 1940 amendment of Section 3(4), when coupled with the reference by the Commission to inbound traffic received from motor carriers, affords another indication of a definite failure on the part of the Commission to apply the statute as Congress intended. In its report on reconsideration, the Commission found (R. 55) that the respondents were justified under Section 1 in treating ex-barge the same as ex-truck traffic, and that the proposed schedules could not be condemned as unlawful under Sections 2 and 3 of the Act, no paragraphs of the latter section being specified. Motor carriers are also subject to the Interstate Commerce Act by virtue of Part II thereof, but Congress significantly omitted to include common carriers by motor vehicle from the connecting lines protected by Section 3(4). When the Commission on its part considers ex-barge traffic to be in the same category as ex-truck traffic it fails to give the statute the application intended by Congress.

B. A CARRIER COMPLAINING OF DISCRIMINATION AGAINST IT NEED NOT HAVE A COMMON ARRANGEMENT FOR THROUGH CARRIAGE WITH THE CONNECTING LINE WHICH IS RESPONSIBLE FOR THE DISCRIMINATION IN ORDER TO BE IN A POSITION TO COMPLAIN OF THAT DISCRIMINATION.

Appellants argue that there must be a through route, by which they apparently mean a common arrangement for through carriage, before we have a connecting line under Section 3(4), *Investigation of Seatrain Lines, Inc.* (1935), 206 I. C. C. 328, 343, being cited. That case is without significance. In the first place it involved the physical interchange of cars between rail lines, on the one hand, and a water carrier equipped to receive railroad cars on its boats.

on the other hand. Such a case has no similarity to one involving discrimination in the matter of reshipping rates. In the second place, that case was decided under Section 3(3) as it read prior to the Transportation Act of 1940. As stated, the section was then construed as not embracing a water line unless that water line was subject to Part I by virtue of having established a common arrangement for continuous carriage with connecting rail lines. These differences also serve to distinguish *Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co.* (Jan. 8, 1940), 237 I. C. C. 97, 101.

The Commission did not find that Section 3(4) was inapplicable due to the lack of a through route; rather, as noted above, the Commission completely ignored the section. The references in the report of Division 2 to the lack of through routes established by common arrangement between water lines not subject to the Act, on the one hand, and eastern railroads, on the other, constituted nothing more than a step in the erroneous reasoning by which Division 2 concluded that the existing proportional and reshipping rates had never been applicable to ex-barge grain. Consequently, the position which the eastern railroads appellants (but not the Commission) take to the construction of Section 3(4), as amended, may or may not reflect the views of the administrative body. The views of the Commission on the point under discussion are not disclosed by its reports.

A discrimination resulting from the maintenance of varying proportionals and reshipping rates dependent upon the particular inbound carrier from which traffic is received constitutes discrimination of an entirely different kind from that which flows from a refusal to establish through routes. An outbound carrier can establish a proportional and reshipping rate without the concurrence of the inbound carrier. Furthermore, in case of traffic temporarily stored

at point of reshipment, there is no need for a common arrangement for through handling. In fact, such an arrangement would be novel since the inbound carrier parts with all control of the traffic when delivered into the elevator. The further movement of the traffic and the rates paid thereon is solely a matter for the outbound carrier. Yet, discrimination between connecting carriers in the application of proportional or reshipping rates is just as offensive as discriminations between connecting carriers in the case of traffic transported over through routes established by a common arrangement.

This appellee is in precisely the same situation as a lake line or as a western railroad insofar as the establishment of a through route for the grain traffic here involved is concerned. In any one of these cases there is no continuous transportation since the inbound carrier delivers the goods into an elevator and completely parts with all control over the goods. There is no rational theory to support the view that Congress intended the prohibition of Section 3(4) as to discrimination in rates between connecting lines to be inapplicable in such a case.

Furthermore, the term "connecting line" has always been applied to these western railroad, lake, and barge lines despite the interruption in the through traffic. Exhibit 1, page 10, shows that the phrase "connecting rail or lake lines" was used in the tariffs as early as August 15, 1912. (R. (ex. vol.) p. 10).

In *Chicago, I. & L. R. Co.* v. *United States*, 270 U. S. 287, 293, this Court refused to set aside an order of the Commission entered under Section 3(4) (then Section 3(3)), although the principal contention of the appellant was that there was no physical connection between it and the line discriminated against.

It was unnecessary to add "common carriers by water subject to Part III" to Section 3(4) if Congress had intended that section to apply only when there was a common arrangement for through carriage. That is because a water line which has entered into such a common arrangement for through carriage would be within the purview of the statute as it read before the 1940 amendment. If the contentions of appellants on this point are valid, the amendment was mere surplusage. The amendment cannot be so treated under accepted canons of statutory construction; it must be given some meaning and application.

C. DISCRIMINATION IN RATES AGAINST A CONNECTING WATER LINE, AND IN FAVOR OF A CONNECTING RAIL LINE, IS NOT AUTHORIZED BY OTHER SECTIONS OF THE ACT.

Some of the appellants present rather involved and not wholly understood arguments based on statutory provisions relating to the establishment of through routes between rail and water carriers and based on Section 305(c) of Part III of the Act.

Apparently one contention is that discrimination between a connecting water line, on the one hand, and a connecting rail line, on the other, is forbidden only if such discrimination constitutes the equivalent of a refusal to establish through routes and joint rates which meet the test of being necessary in the public interest. If so, a complete answer is found in *Chicago, I. & L. R. Co.* v. *United States*, 270 U. S. 287, in which this Court sustained an order of the Commission requiring the removal of discrimination as between connecting carriers found to be in violation of Section 3(3) (now Section 3(4)) of the Act, and in *Virginia R. Co.* v. *United States*, 272 U. S. 658, 666-7, in which this Court sustained an order of the Commission, which found unreasonable an existing through rate main-

tained on a combination basis, but without prescribing through routes and joint rates. In the cases cited, this Court held that the orders assailed should be tested by the authority conferred by the sections of the Act which were being enforced and that other provisions in the Act relating to through routes and joint rates were wholly irrelevant.

Another contention rests on that portion of Section 305(c) of Part III, which provides that differences in the rates of a water carrier in respect of water transportation from those in effect by rail carrier in respect to rail transportation shall not be deemed to constitute unjust discrimination within the meaning of any provision of either Parts I or III of the Act. It is apparently argued that this evidences an intent by Congress to authorize a different treatment for a connecting water line than for a connecting rail line. It should be obvious that such is not the intent of the statute. Congress was fearful that the Commission might force an increase in the rates of water carriers on some theory of unjust discrimination in order to improve the competitive lot of a higher rated rail line with which such water carriers competed in the handling of traffic. This section prevents western lines from complaining that the barge lines cause unjust discrimination against them by virtue of the lower rates maintained by such barge lines. That forces the railroads collectively to adopt the boycott method illustrated by this case in order to handicap the water service.

Congress did not intend to say, however, that the rates charged *for rail service* might lawfully be different as between the traffic received from a connecting rail carrier, on the one hand, and the traffic received from a connecting water carrier, on the other hand, solely because of a difference in the character and nature of the service up to the

reshipping point. If it had intended to so provide, it would have used language different from that found in Section 305(c) of Part III.

D. THE PROVISO IN SECTION 3(1) HAS NO APPLICATION TO THE CASE OF THE INLAND WATERWAYS CORPORATION.

Section 3(1) prohibits undue preference and prejudice of any description as between particular persons, companies, firms, corporations, associations, localities, ports, port districts, gateways, transit points, regions, districts, territories, and particular descriptions of traffic. Section 3(1) concludes with the following proviso:

> "PROVIDED, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Appellees urge that this proviso should be read into paragraph 4 of Section 3 so as to cancel the prohibition there contained against a discrimination in rates against a connecting barge line. The answer to this contention is obvious from the words of the proviso, which refers only to "this paragraph," meaning paragraph 1, and not paragraph 4, of Section 3.

The purpose of the proviso in paragraph 1 is to make it plain that one carrier cannot complain that a competing carrier, which ordinarily would be a paralleling carrier, maintains rates on such a basis as to prejudice the traffic of the complaining carrier. As applied to this case, this appellee would have no right to complain under Paragraph 1 of Section 3 of prejudice to its traffic because of the subnormal railroad adjustment maintained by western lines from Illinois River origins to Chicago. Compare *Mississippi Valley Barge Line Company* v. *United States*, 292 U. S. 282. However, appellee may still complain as a

connecting line under Section 3(4) of the discrimination in rates practiced against it by the railroads east of Chicago.

V. Reasonableness of rates is no defense to a charge of discrimination.

The briefs of the appellants are permeated throughout with the thought that the proposed change in rates is reasonably required so that the Commission properly overlooked the discriminatory character thereof. This Court has repeatedly held that rates which are not properly related are in contravention of the sections of the Act which prohibit discrimination, even though just and reasonable in all other respects.

The Commission, as plaintiff-appellant, so contended in *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U. S. 263, and at page 277, this Court said:

> "* * * We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by *Mr. Justice* Blackburn in *Great Western R. Co.* v. *Sutton*, L. R. 4 H. L. 226, 239: 'When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.'"

See also *American Exp. Co.* v. *South Dakota ex rel. Caldwell*, 244 U. S. 617, 624, and *United States* v. *Illinois C. R. Co.*, 263 U. S. 515, 524.

In *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, relied upon by appellants, there was no issue

as to discrimination in rates as between connecting carriers. In *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, also relied upon by appellants, this Court sustained an order fixing minimum reasonable rates on ex-water coal. That case, however, involved no issue under Section 2 as to unjust discrimination between shippers, nor did it involve any issue under Section 3(4) as to discrimination in rates between connecting carriers.

VI. The Commission committed an error of law in failing to dispose of the case under Section 6 (11) (b) of the Act and in failing to hold the eastern railroad appellants to the burden of proof imposed on them by Section 15(7) of the Act.

Under Section 6(11)(b) of the Act, the Commission is given power to establish proportional rates via railroad to and from ports to which traffic is brought or from which it is taken by a common carrier by water. That is the only section of the Act which uses the words "proportional rates," which are defined as "those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water."[28]

This power is in addition to power conferred elsewhere by the Act to require railroads and water carriers to join in through routes and joint rates, and was placed in the Act as a part of the Panama Canal Act (49 Stat. 543) at a time when port-to-port water service was not subject to any regulation by the Commission. It was continued in the Act, although renumbered, by the Transportation

[28] This section constitutes legislative approval for such discrimination as may result from the fact that ex-water traffic is transported from a given railroad origin to a given railroad destination at less than local rates.

Act of 1940. In view of the fact that the latter statute amended the Interstate Commerce Act so as to provide complete regulation of water transportation and so as to deal comprehensively in other sections with the whole subject of through routes and joint rates between rail and water carriers, Section 6(11)(b) is especially significant in this proceeding which involves proportional rates only. It evidences the intent of Congress to authorize proportional rates on ex-water traffic wholly apart from any through route and joint rate structure. It also evidences the intent of Congress to authorize such proportional rates on ex-water traffic transported inbound by a common carrier by water in cases where the transportation conducted by the water carrier is subject to Part III of the Act,[29] as well as in cases where it is not so subject. Parenthetically, this renders meaningless much of the rather involved argument presented by counsel for appellants regarding the relation of the statutory provisions governing through routes and joint rates between rail and water carriers to the issues in this proceeding.

The 26-cent proportional or reshipping rate on ex-barge and ex-lake grain from Chicago to New York as presently in effect is a proportional of the character defined in the section above mentioned. The proposal of the carriers ap-

[29] Part III of the Interstate Commerce Act subjects to regulation port-to-port transportation by water on inland streams generally. However, Section 303(b) thereof exempts from such regulation "the transportation by a water carrier of commodities involved when the cargo space of the vessel in which section commodities are transported is being used for the carrying of not more than three such commodities," it being further provided, for the purpose of that subsection, that "two or more vessels while navigating as a unit shall be considered to be a single vessel." Since the Inland Waterways Corporation transports bulk grain in tows with general commodities, transportation by it never comes within this exemption. The A. E. Mechling Barge Line, operating on the Illinois waterway and on the Mississippi River between Burlington, Iowa, and New Madrid, Mo., inclusive (R. 1722), conducts transportation within the exemption if not more than three species of grain are contained in a single tow, although the transportation is not exempt when Mechling transports more than three species of grain in the same tow.

proved by the Commission is to eliminate that rate as applied to ex-barge traffic and to continue it as applied to ex-lake traffic.

The carrier respondents before the Commission made no effort to justify 34.5 cents as a reasonable proportional of the character contemplated by Section 6(11)(b). Rather, they rested their entire case on the proposition that there should be no proportional of any character for ex-barge grain. Protestants, who are the appellees here, contended that this was not sufficient and that Section 15(7) of the Act imposed upon the respondents the burden of proof to show that the increased rate is just and reasonable as an ex-water proportional. That is to say, it was incumbent on the carrier respondents before the Commission to show a difference in the outbound transportation conditions encountered in handling the ex-water traffic which arrives via barge and the ex-water traffic which arrives via lake so as to justify a difference in the proportional rates thereon of the character defined in Section 6(11)(b) of the Act. No evidence of the character suggested is in the record.

The Commission ignores Section 6(11)(b) in its report and makes no mention of the burden of proof imposed on the carriers under Section 15(7). The most that the report does is to slant at the possibility of the ex-barge traffic being entitled to a reasonable proportional rate under Section 6(11)(b). That is to say, the report refers to the collective contentions of all protestants regarding the unreasonable, unjustly discriminatory, and unduly prejudicial character of the proposed rates and says (R. 54-55):

> "* * * the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge

traffic lower than local rates or joint barge-and-rail rates lower than the combinations.[30]

"The facts of record as detailed by the division and summarized herein, clearly show that respondents are justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic and that the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act."

By the remark in the first paragraph above quoted, the Commission improperly postponed to undefined and uninitiated future proceedings all exercise of its power and duty under Section 6 (11) (b) of the Act to prescribe just and reasonable proportional rates for application to ex-barge grain. In so doing, the Commission arbitrarily approved schedules which had been shown to it to be unlawful, and postponed indefinitely the restoration of the existing rates to take their place. In so doing, it convicted itself of a dereliction of duty of the nature condemned in *United States et al. v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499, wherein this Court said, at page 510 (emphasis supplied):

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[30] A somewhat corresponding finding is found in the report of Division 2 at pages 358 and 359 reading:

"On exceptions, the Chicago protestants request that we find the Mechling Line to be a common carrier by water and that the grain transported by it to Chicago is within the traffic described in section 6(11)(b) of the act. On argument counsel for this line stated that he has been instructed to file its rates here as a common carrier of grain by February 1, 1941, but that the line takes the position it is not a common carrier 'of everything.' The evidence presented with respect to this line's common-carrier status is not supported by testimony other than the self-serving statements made by its witness. The Mechling Line filed no appearance in this proceeding, and its evidence must, therefore, be construed as gratuitous in character. On the present record the evidence for this line is conflicting and is insufficient to warrant a determination of its carrier status." (R. 18, p. 358)

* * * * *

"Under section 6(13)(c) (now section 6(11)(b)) of the act, we have jurisdiction to prescribe proportional rail rates on traffic which has been hauled to a port or is carried from a port by a common carrier by water. This record is replete with complexities and technicalities, and does not contain sufficient information to warrant prescribing proportional rates on traffic arriving at the rate-break points in common-carrier boats." (R. 18, p. 359)

"The reproach of piecemeal action is incurred by the Commission, which has not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates, which has not questioned its own capacity to prevent unjust reprisals, which has put off to an indefinite future the remodeling of the rate structure for all the carriers affected, and which has left this particular carrier helpless in the interval. In brief a schedule of lower tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. *This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come.*"

Plainly, the Commission ignored the fact that the investigation and suspension proceeding before it involved an issue as to whether the railroad respondents had justified an increase in the proportional rates maintained by them of the character ~~authorized~~ in Section 6(11)(b). This is emphasized by two matters in the report; first, the suggestion that the record is insufficient on which to predicate a finding as to what would be such a reasonable proportional rate. If the record were in fact insufficient, then the respondents did not bear the burden of proof imposed on them by the statute, and the Commission was required to find that the increase had not been justified.[31] We have heretofore shown when a change is proposed, suspended, and hearing had, Section 15(7) is mandatory in requiring the Commission to "make such order with ref-

[31] Prior to the Transportation Act of 1940, the concluding sentence in Section 15(7) of the Act which was in effect at the time of the hearing herein read: "At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this part, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, * * *." The Transportation Act of 1940 amended this provision so as to impose the burden of proof upon the carrier, whether the change in rate be up or down, as to any hearing involving a change in rates after the amendatory provision took effect.

erence thereto as would be proper in a proceeding initiated after it had become effective."[31a]

However we do not contend that the Commission is thereby required to fix a specific rate in lieu of the one proposed. But, if the record is insufficient to fix a specific rate, the Commission must find the proposed increase to be not justified and require a continuation of the existing rate; otherwise the statutory requirement as to burden of proof is transgressed.

Secondly, the Commission finds that ex-barge traffic should be treated the same as ex-truck traffic under Section 1. But the Congress restricts Section 6(11)(b) to ex-water traffic and makes special provision therefor. This marks an intention to treat ex-water traffic different from ex-truck traffic insofar as proportional rates are concerned. This failure to proceed in accordance with correct legal principles affords an additional reason for enjoining the Commission's order.

The fact that the Commission proceeded in an investigation and suspension case rather than upon formal complaint requesting the exercise and the power conferred by Section 6(11)(b) is without significance. In *Chicago, R. & P. R. Co. v. United States*, 274 U. S. 29, 36-7, this Court pointed out that specific reference to Section 6(11)[32] in a formal complaint, or in an order for investigation entered on the Commission's own motion, is not a condition precedent to the consideration by the Commission of a case under that section. In *United States* v. *New York C. R. Co.*, 272 U. S. 457, 462, this Court held that a formal complaint is not a prerequisite to the exercise by the Commission of the jurisdiction conferred on it by Section 6(11) and that it may, on its own motion, investigate and act upon any matter which may be the subject of complaint.

[31a] *Infra*, p. 37.

[32] At that time it was Section 6(13).

In *Sugar from Gulf Coast Port Groups to Northern Points* (1939), 234 I. C. C. 247, 251, the Commission properly said that an investigation and suspension proceeding "opens for consideration the lawfulness of the suspended rates under all provisions of the act."

VII. The basic finding of the Commission as to the effect of the proposed change on reshipments of ex-barge grain via rail is without support in the evidence.

Much of the evidence received by the Commission was directed to the prospective effect of the proposed change upon interested shippers and the traffics involved. The question of the effect upon the traffics is an extremely important consideration in the determination of reasonable rates since, by Section 15a(2), the Commission is specifically directed to "give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed."

In the report of the Commission on reconsideration of December 1, 1941, the following finding was directed to the point under discussion (R. 53):

> "The proposed schedules will not prohibit the movement by barge-rail even to trunk-line territory, their principal commercial effect being to reduce the profits of the Chicago elevator operators."

In a foregoing section of this brief (p. 24 *et seq.*) and in Appendix B hereto (p. 117 *et seq.*) we summarize the undisputed evidence on the point. All of that evidence is directly contrary to the finding of the Commission and the District Court so found. (R. 1670-1)

Counsel for the Commission cites no evidence to support the finding of the Commission.

The eastern railroad appellants assume that the Commission took into consideration the fact that the combined barge-rail rates on the local basis to some few points in Central territory, but not to any point in eastern trunk-line territory, are lower than the all-rail combinations. If that comparison were the basis for the finding, it was not so stated by the Commission. Furthermore that comparison does not, even indirectly, support the finding as to any destination other than the few mentioned in Central territory. However, the finding is emphatic as including eastern trunk-line territory.

Furthermore, the facts recited above and in Appendix B (*infra* p. 117 *et seq.*) show that the movement of ex-barge grain from country origin to final destination is in nowise affected by a comparison of the aggregate barge-rail rates with the aggregate all-rail rates, but is controlled entirely by the separately stated rates available to the traffic at the time of reshipment from Chicago.

There is no question here as to the weight of the testimony. The finding of the Commission is not supported by any evidence and is directly contrary to all the evidence on the point.

VIII. The order of the Commission is not supported by essential preliminary findings sufficient to disclose a rational basis therefor.

A. THE ERRORS OF LAW DEVELOPED AND POINTS II TO VII, INCLUSIVE, RENDER THE ORDER INVALID, REGARDLESS OF THE REASONS WHICH LED TO ITS ENTRY.

The proceeding before the Commission involved three distinct questions: (1) Did the eastern railroads bear the burden of proof of demonstrating that the proposed increase in the proportional and reshipping rates as applied

to ex-barge grain would be just and reasonable under Section 1? (2) Would the proposal result in unjust discrimination between the shippers of ex-barge grain, on the one hand, and the shippers of ex-rail and ex-lake on the other hand, as defined in and prohibited by Section 2? and (3) Would the proposal result in the discrimination in rates as between connecting lines which is prohibited by Section 3(4)?

Thus far, we have shown that the Commission committed the following errors of law in disposing of these questions: In the case of the first question, the Commission erred because, (a) its finding as to the effect of the proposed adjustment on reshipment of ex-barge grain by rail is without support in the evidence; because (b) it exceeded its authority in predicating its finding as to the reasonableness of the local rates as applied to ex-barge grain on a comparison of the barge-rail combinations with the all-rail combinations; and because (c) it misconstrued and misapplied the governing statute when it failed to act under Section 6(11)(b) and failed to hold the respondent carriers to the burden of proof proposed by Section 15(7).

In disposing of the second question, the Commission erred because it construed the phrase "substantially similar circumstances and conditions" in Section 2 as embracing differences which related wholly to the rates and services of inbound carriers, whereas, properly construed, that phrase applies only to the services of the outbound carriers.

In disposing of the third question, the Commission erred because it construed Section 3(4) of the Act as not prohibiting a difference in reshipping rates conditioned on the mode of transportation utilized by the traffic in reaching the reshipping point.

If appellees are correct in any one of these contentions,

the District Court was right in enjoining the order even though the report provides sufficient reasons therefor in all other respects. Consequently, much of the argument contained in the briefs of the appellants does no more than beg the question. The emphasis in the briefs of appellants is on the alleged complicated nature of the rate structure, and on the alleged propriety of an administrative regulation which presumably considered desirable the imposition of a rate handicap and disadvantage on barge service and on the shippers of ex-barge grain. Such briefs treat the questions of statutory construction presented by appellees as if subordinate and in no wise controlling upon the validity of the order. This ignores the basic proposition that the Commission must at all times proceed within the limits of its authority and, if it has failed to do so, its order must be enjoined regardless of whether the ends which it sought to attain are meritorious.

With this background we come to consider whether, *wholly apart from the errors heretofore discussed*, the order of the Commission is supported by essential preliminary findings sufficient to disclose a rational basis therefor.

B. THE DETAIL OF THE RATE STRUCTURE IS NOT THE FOUNDATION FOR THE ORDER.

This case does not, as the applicants would have this Court believe, involve a complicated rate structure. The proposal of the carriers is fairly simple. It is to deprive ex-barge grain of the proportional and reshipping rates on which that traffic has moved for many years, and this deprivation is conditioned *solely* on the fact that the traffic arrives at the reshipping point via the Illinois waterways. Even here, the eastern railroads make an exception which is completely inconsistent with the contention that the all-rail rate structure is so complicated as well as so

sensitive as to be inappropriate for ex-barge traffic. By that exception, it is proposed to continue the Note 20 proportional to the territory east of Buffalo and Pittsburgh, and the trans-Mississippi proportional to Central territory, on shipments moving from Kansas City, Mo., to Chicago under certain port-to-port rates on the grain and grain products which the Inland Waterways Corporation had on file with the Commission when the proposal was made.[33]

Laying aside this exception, the tariff restriction under investigation by the Commission was not conditioned on the origin territory from whence the traffic came. Nor was the assailed restriction conditioned on the level of the rates paid to reach the reshipping point. Under the terms of the proposed tariffs, the proportional and reshipping rates will be denied to all ex-barge grain, with the single exception above noted, *regardless of origin and regardless of the inbound rates paid.* These simple facts render meaningless the argument of appellants that the structure of proportionals which vary, dependent upon the ex-rail origins of the grain, has some mysterious relation to the proposal under investigation. The fundamental weakness of that argument is also marked by the fact that to destinations east of the Buffalo-Pittsburgh line none of the proportionals from Chicago vary according to the western origins of the grain. Rather a single proportional is provided, not only for all ex-rail grain regardless of origin, but also for all ex-barge and ex-lake grain.

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[33] Published in Item 3632 of Federal Barge Lines' Freight Tariff No. 31-J, I. C. C. No. 148, supplements thereto or successive issues thereof (Exhibit 1, p. 7 for the proposed trans-Mississippi application and page 22 for the proposed Note 20 application (R. (ex. vol.) pp. 7, 22).

C. THE FINDING AS TO THE REASONABLENESS OF THE LOCAL RATES, AS SUCH, DOES NOT SUPPORT AN ORDER DIRECTED TO SEPARATELY ESTABLISHED PROPORTIONAL AND RESHIPPING RATES.

We have heretofore shown, on the authority of *Interstate Commerce Commission* v. *B. & O. R. Co.*, 145 U. S. 263, 277, that a rate may be perfectly reasonable under Section 1 and yet be unlawful because discriminatory under Sections 2 and 3. Consequently, no matter what the Commission may have found as to the reasonableness of the rates in issue, such findings afford no support for the ultimate conclusion that the rates are not unlawful under Sections 2 and 3(4).

Furthermore, the preliminary finding which the Commission did make on the matter of reasonableness is inadequate to support a conclusion under Section 1. That finding in the report on reconsideration reads (R. 52):

> "* * * The proposed ex-barge rates, which are the same as the local rates, range from 17.3 to 25.7 per cent of first class and are substantially below the level of the sixth-class rates (27.5 per cent of first class) which has been prescribed or approved as a reasonable maximum basis in official territory."

A somewhat similar statement in the report of Division 2 cites a number of Commission cases. (R. 18, p. 366)

The argument of appellants that the proposed change would result in a reasonable rate structure finds no support in the finding above quoted because the Commission cases referred to did not involve what this case involves, *i. e.*, the reasonableness of a separately established proportional and reshipping rate as distinguished from a reasonable through rate from country origin to final destination. Finding No. 16 of the District Court is in line

with the proposition just stated. (R. 1670) An analysis of the cases cited by the Commission shows that the finding of the District Court was right. Those cases are summarized in Section 1 of Appendix "C" hereto. (*Post* pp. 122-127) Section 2 of Appendix "C" rounds out the picture by summarizing cases in a different group in which the Commission has given independent consideration to the separately established proportional, reshipping, and ex-lake rates in the territory east of Chicago. None of the cases in the latter group approves a proportional, reshipping, or ex-lake rate which is as high as the sixth-class rates.

I. THE FINDINGS IN THE REPORT OF DIVISION 2 AS TO THE ALLEGED DISRUPTION OF THE RATE STRUCTURE DO NOT SUPPORT THE ORDER OF THE COMMISSION ON RECONSIDERATION.

Appellants repeatedly urge that the order of the Commission was required to prevent some undefined disruption of the all-rail rate structure. Since the report of the Commission on reconsideration did not predicate its ultimate conclusion on any such preliminary finding, it is perhaps unnecessary to deal with the point.

However, we do offer these observations: The report on reconsideration was entered after the Commission had considered petitions for reconsideration which urged that the findings of Division 2 as to alleged disruption of rate structure were unsupported by the evidence, except to the extent that the advent of low-rated barge transportation had induced western lines to establish a sub-normal basis of inbound rates via rail to Chicago from a limited area. Consequently, when the Commission failed to affirm the findings of Division 2 as to this matter, the expressions contained in that report of Division 2 must be deemed to have been withdrawn. *New England Divisions case*, 261 U. S. 184, 203.

The record contains no evidence as to any actual, or prospective, change in any rail rate on grain to a destination to the east of Chicago, the only destination territory to which apply the rates in issue. There is no evidence that any shipper from an intermediate origin in Indiana, Michigan, or Ohio to the east has complained of the existing application of proportional and reshipping rates to ex-barge grain, or has urged that any of such eastern rates should be changed or reduced by reason of that application.

Appellees agree that the low rates via barge on the Illinois River have induced the competitive basis of intrastate rates maintained by western lines.[34] That competitive situation will obviously continue so long as there is any substantial barge movement. However that competition exhausts itself on the inbound haul to Chicago. We respectfully assert that a desire on the part of the railroads and of the Commission to foster inbound transportation by rail, rather than by barge, affords no rational basis for the order directed to outbound rates. The carrying into effect of that desire is not only in direct contravention of the National Transportation Policy but it also flouts the

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[34] The miles of railroad and the stations served by lines in the territory from whence this depressed adjustment is maintained by rail are as follows: *western lines*: the Wabash Railroad, 95 miles serving 24 stations; the Alton Railroad, 149 miles serving 38 stations; the Aichison, Topeka & Santa Fe Railroad, 112 miles serving 28 stations; the Chicago, Burlington & Quincy Railroad, 400 miles serving 101 stations; the Chicago & Eastern Illinois Railroad 55 miles, serving 17 stations; the Chicago Great Western Railroad serving 84 miles serving 19 stations; the North Western Railroad 210 miles serving 53 stations; the Chicago Rock Island & Pacific Railroad serving 124 miles serving 25 stations; the Illinois Central Railroad serving 204 miles serving 53 stations, and the Chicago, Milwaukee & St. Paul & Pacific Railroad, 220 miles serving 48 stations.

In addition, the Elgin, Joliet & Eastern Railroad, *a belt line* around Chicago, which reaches Chicago over a line through Indiana operates 98 miles in this territory, serving 17 stations.

The only *western segments of eastern lines* in this territory are operated by the New York Central and Michigan Central combined, 123 miles (erroneously reported as 23) serving only 49 stations. (R. 1411-12)

rule of reason. Compare *Mississippi Valley Barge L. Co. v. United States*, 292 U. S. 282, 288.

The existing disturbance of the inbound rail rate structure to Chicago cannot be avoided unless the eastern lines are permitted to establish reshipping rates on ex-barge grain so extortionate and discriminatory as to kill off inbound transportation via barge. Shippers located along the Illinois River must be denied the natural advantages of their location which makes low-cost barge service available to them. Shippers of ex-barge grain from Chicago must be denied an equality of charges with shippers of ex-lake and ex-rail grain. Regulation must be administered solely in the interest of the railroads who are thus made the masters, rather than the servants, of the shipping public. The mere statement of these propositions indicates that the predicate for the order on which appellants rely is wholly unrelated to a proper discharge by the Commission of its administrative function.

E. THE FOURTH SECTION OF THE ACT DOES NOT SUPPORT THE COMMISSION'S ORDER.

To destinations east of Buffalo and Pittsburgh the local rates via rail from Chicago are uniformly 8.5 cents in excess of the proportional or reshipping rates via rail to the same destinations. In that situation, the aggregate of an inbound charge and an outbound charge will be less than the local rate from Chicago in all instances where the inbound charge is less than 8.5 cents. The Commission in its report on reconsideration notes that the barge rate from Morris to Chicago is only 2.75 cents and finds that such a rate, when combined with the proportional rate to the east is "in contravention of the fourth-section rule." (R. 52) Much is made of this situation in all of the briefs of all appellants.

Section 4(1) of the Interstate Commerce Act, as in effect at the time of the hearings and as in effect after amendment by the Transportation Act of 1940, is reproduced in Appendix A hereto.

The question to be discussed is whether or not this alleged departure from the long-and-short-haul rule of the fourth section provides a rational basis for the order here under review. We respectfully submit it does not for the following reasons:

(1) The Fourth Section rule does no more than require that the rate from the intermediate point be not higher than the rate from a more distant point to a common destination. Under the rates as approved by the order of the Commission, the combination barge-rail rates will, in all instances, be higher than the local rate from Chicago by the amount of the inbound rate. Plainly, no principle in the Fourth Section requires that result. If the Fourth Section rule had in fact been used by the Commission as its yardstick, it would have found that the proportionals on ex-barge grain should not exceed rates which, when combined with the inbound rates via barge, were not less than the local rates from Chicago. Such rates would be lower than the local rates by an amount equivalent to the inbound rate via barge.

(2) The rates of the Inland Waterways Corporation from Kansas City to Chicago are, in all instances, in excess of 8.5 cents. The combination barge-rail rates from Kansas City are never less than, but are always in excess of the local rates from Chicago. Consequently, the finding of the Commission not only failed to provide a rational basis for applying the full local rate on ex-barge grain from Kansas City, but, in addition, is without support in the evidence.

(3) The alleged departures from the Fourth Section rule are not the result of the present proportional and reshipping rates, but are wholly due to level of the inbound rates via water. To use the Fourth Section rule as a yardstick for outbound rates via rail is a direct attack on the principle declared by the National Transportation Policy that the inherent advantage of low cost water transportation should be reflected in the rates paid by the shipping public.

Consider the situation as if there were no barge transportation. In that event, a 26-cent proportional and reshipping rate from Chicago is accepted by carriers and shippers alike as entirely satisfactory and appropriate under every section of the Act. This is so even though the Pennsylvania Railroad performs more service under that rate, as measured by distance, than it performs in transporting traffic from directly intermediate origins on the same line in Indiana and Ohio to New York. That disparity between the proportional and reshipping rates from Chicago to the east, on the one hand, and the local rates from intermediate origins to like destinations, on the other hand, was approved by the Commission in *Baltimore Chamber of Commerce* v. *B. & O. R. R. Co.* (1912), 22 I. C. C. 596, and has never since been questioned.

The only change in the picture comes from entrance of the Mechling Barge Line. The low cost barge services of that carrier permit it to bring grain from Morris to Chicago for a rate of 2.75 cents as against the interstate rate of 9.5 cents charged for railroad transportation. There has been no change in the rates or the services of the Pennsylvania Railroad east of Chicago. There has been no change in the competitive situation of the shipper at the intermediate origin at Indiana or Ohio, since he must sell in New York in competition with a

26-cent proportional rate from Chicago, regardless of whether or not the grain arrives at Chicago via barge, via rail, or via lake. (R. 1567) The shipper from Indiana and Ohio is not disadvantaged by the fact that the low cost barge transportation available to the farmer at Morris gives him a better net price.[35] (R. 1568-9) These matters considered, it plainly follows that the Fourth Section rule provides no rational basis for an approval of a proposal by the Pennsylvania Railroad to increase its proportional and reshipping rate on ex-barge grain. The resulting blockade against the reshipment of ex-barge grain via rail would help neither the Pennsylvania Railroad nor any shipper on its line east of Chicago.

(4) If the Fourth Section rule requires that ex-barge grain be penalized, then ex-lake grain should be subjected to a corresponding penalty. The ex-lake rate of 26 cents from Chicago to New York applies on grain brought in via lake from any origin, even though trucked to the point where it is loaded into a lake steamer. (R. 280) The combination of the lake rate from Duluth to Chicago of 6.25 cents plus the proportional and reshipping rate beyond of 26 cents equals 32.25 cents, which is less than the local rate from Chicago. That is equally in contravention of the Fourth Section rule.

The lake rate from Duluth of 6.25 cents also applies to Buffalo. From Buffalo to New York, the ex-lake rate on export traffic is 10.5 cents and the local rate on export traffic is 23 cents. (Ex. 70; R. (ex. vol.) p. 118) The lake-rail combination in this instance of 16.5 cents is substantially less than the local rate from the reshipping point. Yet the Commission approves rates on ex-lake grain lower than local rates.

(5) Congress did not intend that a railroad proportional and reshipping rate should be increased because

[35] See also evidence of witness Burwash (*supra*, p. 13)

that rate, in combination with a separately established and controlled water rate from beyond, aggregated less than the local rate from the reshipping point. This is evidenced by the amendment to Section 4 contained in the Transportation Act of 1940. (54 Stat. 904) Section 6(a) of the Transportation Act amended paragraph 1 of Section 4 so as to include common carriers by water subject to Part III therein. Congress further provided in Section 6(b) of that Act as follows:

> "In the case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Commerce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section. In the case of a carrier not heretofore subject to the provisions of such paragraph, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed, by reason of the provisions of such paragraph, as amended by subsection (a) of this section, prior to six months after the enactment of this Act, or in case application for the continuance of any such existing rate, fare, or charge is filed with the Interstate Commerce Commission within such six months period, until the Commission has acted upon such application."

The first sentence in the foregoing paragraph deals with the proportional and reshipping rates of the eastern railroads. Those rates were lawfully in effect at the time the Transportation Act was enacted. Congress appreciated that rates via barge are commonly on a substantially lower basis than rates via rail. Therefore, it took pains to provide that no railroad rate need be changed in order to comply with Section 4(1) as amended, even though that rate in combination with a water rate from beyond produced an aggregate less than the railroad rate from an intermediate origin on the water-rail route.

(6) The final, and perhaps the conclusive answer on this point, is that the Fourth Section, no matter how construed and applied, cannot be used as a cloak to cover the discriminations against shippers and against connecting carriers which are prohibited by Sections 2 and 3(4) of the Act. Just because rates are in strict conformity to Section 4(1) does not stamp them as free from discriminations in every other respect.

F. THERE IS NO FINDING TO INDICATE THE EXTENT TO WHICH PROPORTIONAL AND RESHIPPING RATES SHOULD VARY DEPENDENT UPON THE CHARACTER OF THE INBOUND SERVICES AND THE RATES ASSESSED THEREFOR.

The finding of the Commission that proportional and reshipping rates are in their essence balances of through rates which may be "determined by the measure of the inbound and through rates and properly may vary according to the relative length and nature of the inbound and through service" (R. 54) is left dangling in the report of the Commission on reconsideration. That is to say, there is no preliminary finding in the report of the Commission as to what should be the difference between the outbound rate on ex-barge grain, on the one hand, and the outbound rate on ex-lake or ex-rail grain, on the other hand, in order to reflect the differences which the Commission said should control the measure of the outbound rates.

The water services here involved are performed by various barge lines and by various lake lines. The water hauls vary from a short haul from Morris, Ill., up to much longer hauls from Kansas City, Mo., and from Duluth, Minn. The water rates cover a wide range and are 2.75 cents from Morris, 6.25 cents from Duluth and 10.75 cents from Kansas City.[36]

If these various differences require a difference in the measure of the reshipping rates, the amounts of the rate variations are susceptible of determination and should

[36] See page 8, *supra*.

have been stated. Furthermore, the Commission should have explained why a 26-cent proportional rate is appropriate for ex-lake grain which is received inbound on a 6.25-cent rate, while a 34.5 cent rate is appropriate for ex-barge grain which is received inbound on a 2.75 cent rate, as well as ex-barge grain received inbound on a 10.75 cent rate.

This is not a matter of insisting that the Commission should disclose each detail in its reasoning. It is a matter of insisting that the final conclusion of the Commission should be predicated on a rational theory which is plain on the face of the report. The order here assailed is not supported in this respect. Consequently, another reason is afforded for enjoining the Commission's order.

Conclusion.

Upon the ultimate question for determination in this Court, *i. e.*, the validity of the Commission's order, it appears that the Commission did not act within its authority.

The errors of law committed by the Commission may be summarized as follows:

The Commission misconstrued and misapplied Section 3(4) in finding that a discrimination in rates as between connecting carriers is justified by a difference in the nature of the inbound services and a difference in charges assessed by the inbound carriers for their respective services.

The Commission misconstrued and misapplied Section 2 in holding that differences in the matter of inbound services, rates, and carriers, justify a difference in charges assessed against shippers for identical outbound services.

The Commission misapplied Section 1 of the Act (a) in determining the reasonableness of the rates to be applied;

on a reshipment of ex-barge grain upon a consideration of the combination through rates; (b) in failing to hold the railroad respondents to the burden of proof imposed by Section 15(7) when considered in connection with Section 6(11); and (c) in making findings which are without support in the evidence and are contrary thereto.

Finally, the order of the Commission is deficient in that it lacks essential basic findings sufficient to disclose a proper application of the statutory standards by which it must determine the lawfulness of rates under Sections 1, 2, and 3 of the Act.

Upon these considerations, appellees respectfully submit that this Court should affirm the final decree of the District Court.

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Appendix A.

Statutes Cited.

(Unless otherwise indicated, the statutes as reproduced are those presently in effect as amended by the Transportation Act of 1940.)

THE NATIONAL TRANSPORTATION POLICY

(Act September 18, 1940, c. 722, Title 1, Section 1, 54 Stat. 899, Title 49 U.S.C.A., preceding Section 1.)

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Part I of the Interstate Commerce Act.

SECTION 1(1)(a) (TITLE 49, U.S.C., SEC. 1(1)(a)).

"(1) That the provisions of this chapter shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment:

* * * * *

"* * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States."

SECTION 1 (5)(a) (TITLE 49, U.S.C., SEC. 1(5)(a)).

"(5)(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

SEC. 2 (TITLE 49 U.S.C., SEC. 2).

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him

or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

SECTION 3(1) (TITLE 49, U.S.C., SEC. 3(1)).

"(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

SEC. 3(4) (49 U.S.C., SEC. 3(4)).

SECTION 3(3) (Title 49, U.S.C., Section 3(3)), prior to September 18, 1940, read as follows:

"(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

By the amendments of September 18, 1940, this paragraph was changed to Section 3(4) and its language to read as follows:

"(4) All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter of any common carrier by water subject to Part III."

SECTION 4(1) (TITLE 49, U.S.C., SEC. 4(1))

Section 4(1) of Part I of the Interstate Commerce Act (U.S.C., Title 49, Section 4(1)) prior to the Transportation Act of 1940, approved September 18, 1940, read as follows:

"(1) That it shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part, but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission

may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section;" * * *

Section 6 of the Transportation Act of 1940 (54 Stat. L. 904) reads as follows:

"LONG AND SHORT HAUL PROVISION."

"Sec. 6(a) Paragraph (1) of section 4 of the Interstate Commerce Act is amended to read as follows:

'(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the

Commission shall permit such tariffs to become effective upon one day's notice.

"(b) In the case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Commerce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed by reasons of the amendments made to such paragraph by subsection (a) of this section. In the case of a carrier not heretofore subject to the provisions of such paragraph, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed, by reason of the provisions of such paragraph, as amended by subsection (a) of this section, prior to six months after the enactment of this Act, or in case application for the continuance of any such existing rate, fare, or charge is filed with the Interstate Commerce Commission within such six months period, until the Commission has acted upon such application."

SECTION 6(1) (TITLE 49, U.S.C., SEC. 6(1))

"(1) Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules

or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

SECTION 6(11) (49 U.S.C., SEC. 6(11)).

"(11) When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passenger or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right-of-way, or by directing either or both the rail and water carrier, individually or in connection with one another to construct and connect with the lines of the rail carrier a track or tracks to the dock. The commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the commission under the provisions of this paragraph shall be subject to the same restrictions as to findings

of public convenience and necessity and other matters as is construction required under section 1 of this chapter.

(b) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water."

SECTION 13(1) (TITLE 49, U.S.C., SEC. 13(1)).

"(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

SECTION 13(2) (TITLE 49, U.S.C., SEC. 13(2)).

"(2) Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide."

SECTION 15(1) (TITLE 49, U.S.C., SEC. 15(1)).

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the trans-

portation of persons or property as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

SECTION 15(7) (49 U.S.C., SECTION 15(7)).

"(7) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and deliv-

ering to the carrier or carriers affecting thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

SECTION 15a (TITLE 49, U.S.C.A., SECTION 15a).

"(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

"(2) In the exercise of its power to prescribe just

and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

Part III of the Interstate Commerce Act.

SECTION 302(d) (TITLE 49, U.S.C., SEC. 902(d)).

"(d) The term 'common carrier by water' means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title."

SECTION 303(b) (TITLE 49, U.S.C., SECTION 903(b)).

"(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this chapter takes effect, to the provisions of sections 843-848 of Title 46, as amended."

SECTION 305(c) (TITLE 49 U.S.C., SECTION 905(c)).

"(c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this chapter and chapters 1 and 8 of this title."

SECTION 305(d) (TITLE 49, U.S.C., SEC. 905(d)).

"(d) All common carriers by water shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this subsection the term 'connecting line' means the connecting line of any common carrier by water or any common carrier subject to chapter 1 of this title."

SECTION 306(a) (TITLE 49, U.S.C., SEC. 906(a)).

"(a) Every common carrier by water shall file with the Commission, and print, and keep open to

public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee."

Section 90 of the Railway Clauses Consolidation Act of 1845, 8 & 9, Vict., ch. 20:

"Sec. 90. And whereas it is expedient that the company should be enabled to vary the tolls upon the railways so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect to all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway."

Appendix B.

SUMMARY OF EVIDENCE WHICH IS DIRECTLY CONTRARY TO FINDING OF THE COMMISSION THAT THE PROPOSED CHANGE WOULD NOT PROHIBIT THE RESHIPMENT OF EX-BARGE GRAIN VIA RAIL FROM CHICAGO TO THE EAST.

Grain purchased by these appellees at Chicago is purchased at a delivered price, the cost incurred in the inbound transportation being at the expense of the seller. Consequently, such inbound transportation costs directly affect the net price received by the seller at his country shipping station. (R. 1527, 1534)

All grain of the same grade and species comes to a common value at Chicago. (R. 1384, 1527, 1558, 1634) The appellees pay the same price *delivered* at Chicago for ex-barge as is contemporaneously being paid for ex-rail and ex-lake grain presently entitled to a later reshipment via rail on the reshipping rates. (R. 1383, 1528, 1626) As a result, the country seller obtains a higher net price when he ships to Chicago via barge than via rail, since the inbound barge rates are substantially lower than the inbound rail rates from the same origin. For example, the interstate rail rate to Chicago from Morris, Illinois, is 9.5 cents as compared with 2.75 cents via barge. (R. 18, p. 361) While the barge movement incurs certain accumulation and handling costs not incurred in connection with a rail inbound movement, the net price to the farmer in the country is greater by from 2.7 to 3.45 cents *per bushel* when the inbound move is via barge than when it is via rail at the interstate railroad rate. (R. 18, p. 361)

Looking now to the resale and reshipment, the following additional facts are shown in the evidence and are not dis-

puted: Ex-barge, ex-rail, and ex-lake grain are not only bought at the same price, but they are sold at the same price. (R. 1568, 1633) Grain selling prices in the east are named on a *delivered* (to an eastern destination) basis, and are directly predicated on the cost of transporting the grain from Chicago to destination, *i. e.*, on the freight rate from Chicago to destination to which the grain is entitled under the tariffs. (R. 1520-21, 1568)

The possibility of making a particular sale or of reaching a particular destination is directly affected by the freight rate structure out of the market. (R. 1558, 1618) The reshipping rate made available by reason of the inbound billing was characterized as the "decisive factor that determines what we can do with the corn after it gets into Chicago." (R. 1558)

The Chicago elevator receives no greater profit per bushel in merchandising grain received via barge than in merchandising grain received via rail. (R. 1626) The grain business is done on a margin of one-quarter of a cent per bushel;[1b] that is, a difference in price in that amount will affect a sale. (R. 1635)

If ex-barge and ex-rail grain must be sold for the same delivered price at New York (R. 1568), and if the freight paid, or the freight allowed to destination, is 8.5 cents per hundred pounds greater on the ex-barge grain than on the ex-rail grain, the Chicago elevator must be in a position to sell ex-barge grain at a price which will net him at Chicago 8.5 cents per hundred pounds less than the price which he would net from a corresponding lot of ex-rail grain. According to the evidence, there is no circumstance which would permit that to be done. (R. 1633) Both ex-

[1b] While freight rates are named in cents per hundred pounds, grain prices are commonly named in bushels. The weight per bushel of corn is 56 pounds and wheat or soybeans is 60 pounds. (R. 1254-5)

barge and ex-rail grain have the same value in Chicago. (R. 1383, 1385, 1528, 1558, 1626) The rate basis used in selling ex-barge grain must be and is the same as used in selling ex-rail grain. (R. 1568) The outbound rates from the market alone determine what can be done with grain after it is accumulated. (R. 1513-4) If the Chicago value is 50, and the rate basis required to make sale is 26, we have two factors which add to 76. Mathematically, it is impossible to make them add to 84.5.

Chairman Eastman noted in his dissenting opinion this disagreement between the facts shown in the evidence and the finding in the report of the majority. (R. 70)

Other facts of record which show that the direct effect of the proposed change would be a complete barrier against the transportation of ex-barge grain via railroad from Chicago to the east are as follows: Presently much grain is received in Chicago via truck and the tariffs of eastern lines do not now provide nor have they provided in the past, for proportional or reshipping rates on ex-truck grain. (R. 18, p. 364) Nevertheless, the local rates from Chicago to the east have not, within the knowledge of the witnesses before the Commission, moved a pound of grain of any kind. (R. 1371, 1578)

It was repeatedly stated, without contradiction, that if the proposed change becomes effective the only avenue by which ex-barge grain can ever move out of Chicago will be via lakes.[2b] (R. 1278-9, 1572) To quote a representative question and answer (R. 1566):

[2b] A large portion of the outbound movement from Chicago is via the Great Lakes, even as to grain entitled to proportional or reshipping rates. This is because the Great Lakes ordinarily provide a cheaper method of transportation from Chicago to Buffalo, New York, and to the territory east of Buffalo which can be reached via canal and via rail. A table shown in the appendix to the report of July 31, 1942 (R. 18, p. 384), shows that in the calendar years 1933 to 1939, inclusive, the total bushels of corn, wheat, oats, and soybeans reshipped from Chicago divided 301,004,000 bushels via lake and 322,362,000 bushels via rail.

"Q. (By Mr. Belnap) Now if the barge grain could not take the proportional rates to Eastern Trunk Line and New England territory, would every pound of that grain, other than what might be consumed here, necessarily move out of Chicago over the lakes?

"A. (By Mr. McClintock) I cannot conceive of it moving in any other direction; as the mere suspension or denying the reshipping rate as now in effect automatically places a penalty of 8½ cents a hundred against that grain, there is no conceivable manner in which the grain could be moved into consuming territory other than across lake."

Presently ex-barge grain is able to meet the competition of ex-rail and ex-lake grain in being distributed via railroad from Chicago to the east, and this has provided the rail carriers east of Chicago with an opportunity for handling some of the ex-barge traffic. (R. 1280)

Of course, during the four or five months in the winter of each year in which the lakes are closed to navigation, all shipments from Chicago must move via rail. However, even during the season of open navigation, there is a substantial volume of rail movement. A study made by the eastern railroads confined to corn from nearby Illinois territory shows that in the period May 1 to November 30, 1939, 14 per cent of the rail receipts were reshipped via railroad and 16 per cent of the barge receipts were so reshipped. (R. 18, pp. 366-7)

If the proposed change is made, the eastern lines will have no opportunity to compete with the lakes for ex-barge traffic (R 1280), and ex-barge grain traffic will have no opportunity to compete with ex-rail or ex-lake grain for reshipment in cases where a railroad movement is necessary to reach delivery point. (R. 1575, 1576) When this case was being heard in January, 1940, the Continental Grain Company, one of the appellees in this case, was in the

process of shipping a million bushels of ex-barge grain via railroad to Baltimore for export, and the evidence is that the sale in question could not have been made if the ex-barge grain had been denied the proportional or re-shipping rate. (R. 1548)

When the Great Lakes are open to navigation, ex-barge grain will still have an outlet from Chicago, although to a limited marketing area. To the eastern territory which must be reached by railroad from Chicago, ex-barge grain could not be sold in competition with ex-rail or ex-lake grain. (R. 1575, 1576-7) It is impossible, as a practical matter, to absorb a rate penalty on an outbound shipment of grain. (R. 1599) One witness for the Chicago elevators said that the proposal to increase the rate on ex-barge grain to the full local basis was the equivalent, for all practical purposes, of having no railroad rate at all on ex-barge grain. (R. 1566)

When we consider the four or five months during the winter when navigation is closed on the Great Lakes, the only thing that can be done with ex-barge grain in Chicago is to store it until navigation opens in the spring. That would result in congesting elevator space, at least to the point of preventing the normal turnover of that space, which would occur two, three, or four times within that period. (R. 1549, 1561-2)

Appendix C.

Section 1.

RATE CASES REFERRED TO BY THE COMMISSION AS FIXING A REASONABLE LEVEL OF RATES WITHIN OFFICIAL TERRITORY INVOLVED ONLY THROUGH RATES FROM COUNTRY ORIGINS AND DID NOT INVOLVE RESHIPPING RATES AS APPLIED TO TRAFFIC HAVING A PRIOR HAUL BY RAIL OR BY WATER.

Indianapolis Board of Trade v. *B. & O. R. R. Co.* (1927), 129 I. C. C. 675, involved through local rates from a limited number of country origins in Illinois and Indiana via Indianapolis to destinations to the east and south thereof. These rates were on the 6th class basis, that is, they were the same as the 6th class rates. Some of the through rates did not apply over routes through Indianapolis, and that was the subject of the principal complaint. The Commission declined to require the defendant carriers to establish additional routes and found upon the evidence that the rates complained of were not shown to be unreasonable or unduly prejudicial. Accordingly, the complaint was dismissed.

Grain and Grain Products (1928), 144 I. C. C. 497, involved local rates on grain from country origins in Ohio to destinations in West Virginia and Kentucky, and rates on grain from country origins in Illinois and Indiana to destinations in central territory and to destinations on the Chesapeake & Ohio Railway in West Virginia and Kentucky. The issues as to the rates from Illinois and Indiana were similar to those involved in the case immediately above cited, and that issue was similarly disposed of. As to the local rates from Ohio origins, the Commission found

that certain increases proposed therein by carriers had not been justified.

In *Valley Grain Co.* v. *Cleveland, C., C. & St. L. Ry. Co.* (1929), 159 I. C. C. 223; (1930), 167 I. C. C. 190, the rates involved applied from a country station, Wing, Illinois, to St. Louis, Missouri, Chicago, Illinois, Battle Creek, Michigan, and Louisville, Kentucky. The case largely involved the relation of rates from Wing to the rates from nearby country stations to the same destinations. The Commission found that none of the rates assailed were unreasonable but did find that the assailed rate relation as between Wing and nearby country origins resulted in undue preference and prejudice. Among the rates involved in that case was a 11-cent proportional rate from Wing to Chicago. The Commission disposed of the issues as to that rate without giving any consideration at all to the proportional rates from Chicago to the east.

In *Cooperative Elevator Co.* v. *Wabash Ry. Co.* (1933), 192 I. C. C. 583, were involved local rates from three country stations in Indiana to destinations in Ohio and Kentucky. The Commission found that the assailed rates were not unreasonable.

In *Goldcamp Mill Co., Inc.* v. *Akron, C. & Y. R. Co.* (1933), 195 I. C. C. 329, the complaint assailed the local commodity rates from origins in Ohio, Indiana, Illinois, Michigan, Missouri, and Wisconsin on grain, in carloads, milled in transit at Ironton, Ohio, and forwarded as products to destinations in West Virginia, and Kentucky on the Norfolk & Western and Virginian railways. Under the adjustment complained of, rates from any given origin were the same to a large destination blanket or group known as the Norfolk group. As a result, the rates to the nearby points in the destination group were higher than the corresponding 6th class rates, the latter being graded accord-

ing to distance. In that situation, the Commission found that the through rates which were higher than 6th class were excessive and unreasonable.

In *Grain and Products to Chesapeake & O. Branch Lines* (1933), 196 I. C. C. 751, the Chesapeake & Ohio proposed to increase its local rates on grain from origins in central freight association territory to destinations on branch lines in West Virginia and Kentucky to a level which would exceed the 6th class rates. The Commission found the proposal not justified and required the suspended schedules to be canceled.

In *Allen & Wheeler Co. v. Akron, C. & Y. Ry. Co.* (1937), 225 I. C. C. 179, was involved rates on grain from origins in central territory and in western states milled in transit at various points in Indiana, Ohio, Kentucky, and West Virginia and forwarded as products to destinations in Kentucky, Virginia, West Virginia, and Tennessee. The rates involved from origins in central freight association territory were one-factor local rates. From origins from west of Chicago the through rates assailed were made up of local rates to the first gateway, plus one or two proportional or reshipping rates beyond. The complaint centered on the one-factor rates from central freight association territory to the destinations, and on the proportional or reshipping rates east of Chicago and other western gateways to the destinations. This case is very similar to the *Goldcamp Mill Co., Inc.*, case, *supra*, in that the chief source of complaint was in applying a single rate from a given origin or reshipping point to a large destination group, this resulting in the through rates being higher than the 6th class rates to the nearby points in the destination group. The Commission followed its decision in the *Goldcamp Mill Co., Inc.*, case.

Section 2.

SUMMARY OF CASES INVOLVING AN INDEPENDENT CONSIDERATION OF PROPORTIONAL, RESHIPPING, AND EX-LAKE RATES WITHIN OFFICIAL TERRITORY.

In *Baltimore Chamber of Commerce* v. *B. & O. R. R. Co.* (1912), 22 I. C. C. 596, the Commission approved reshipping rates lower than local rates from Chicago to Baltimore, which reshipping rates then applied on ex-lake as well as ex-rail grain (Ex. 1), and dismissed a complaint in which the Baltimore Chamber of Commerce complained because the reshipping rates from Chicago to Baltimore were lower than the local rates from intermediate country stations in Illinois and Indiana.

In *Toledo Produce Exchange* v. *A. A. R. R. Co.* (1913), 27 I. C. C. 536, the Commission found that Toledo, Ohio, was entitled to a basis of ex-lake rates reasonably related to those maintained from other ports, and in a further report in the same case, 30 I. C. C. 498 (1914), it approved from Toledo to New York a reshipping rate on ex-rail grain of 13.5 cents and an ex-lake rate in the same amount as compared with a local rate of 15.5 cents.

In *Buffalo Grain Cases* (1917), 46 I. C. C. 570, it appeared that from Chicago the rates on corn to New York were 21.8 cents locally and 16.8 cents reshipping, and that, as compared therewith, the local rate from Buffalo was 11.6 cents and the ex-lake rate 9.82 cents. Upon complaint, the Commission found that these rates were not unreasonable or improperly related.

In *Peoria Board of Trade* v. *A., T. & S. F. Ry. Co.* (1919), 55 I. C. C. 42, which involved only all-rail traffic, the Commission found that reshipping rates from Peoria 2 cents higher than from Chicago met the requirements of the Act and that certain one factor through rates via

Peoria were excessive and unreasonable to the extent they exceeded the intermediate rates constructed by the use of such reshipping rates.

In *Ex-Lake Grain to North Atlantic Ports* (1939), 235 I. C. C. 415, the Commission fixed 10 cents as a minimum reasonable rate on ex-lake grain, in carloads, from Buffalo to New York, N. Y., for export. This is to be compared with the local rate from Buffalo to New York of 23 cents. (Exhibit 70)

In *Export Grain, C. F. A. Territory to North Atlantic Ports* (1940), 235 I. C. C. 655, the Commission refused to permit eastern lines to reduce the reshipping basis from Chicago to Baltimore on export grain from 16 cents to 12 cents per hundred pounds. Incidentally, the reshipping rate for which the eastern lines there sought approval is less than half of the reshipping rate which they seek in this case to apply on ex-barge grain. In that case the Commission noted on page 657 that the reshipping rates under consideration applied alike on ex-rail, ex-river, and ex-lake grain, and that throughout the report it treated all three kinds of traffic alike.

In *Oswego* v. *B. & O. R. R. Co.* (1928), 146 I. C. C. 293 (1929), 151 I. C. C. 717, the Commission required eastern lines to provide Oswego, New York, with an adjustment of ex-lake rates lower than local rates properly related to the ex-lake rate structure contemporaneously maintained from Buffalo.

In *Ex-Lake Grain from Ogdensburg to New England* (1935), 208 I. C. C. 385 (1935), 209 I. C. C. 500, the Commission declined to permit a proposed increase in ex-lake rates on grain from Ogdensburg, N. Y., to destinations in New England. Incidentally, in that case the Commission noted, at page 505, that the average 6th class rate from

Ogdensburg was 27 cents, and yet the ex-lake rate to Boston which the Commission said should not be increased was 16.6 cents. As indicated by that case, the Commission has never used 6th class rates as a yardstick for measuring the reasonableness of reshipping rates on ex-water traffic, although that yardstick may be quite appropriate where local rates alone are involved.